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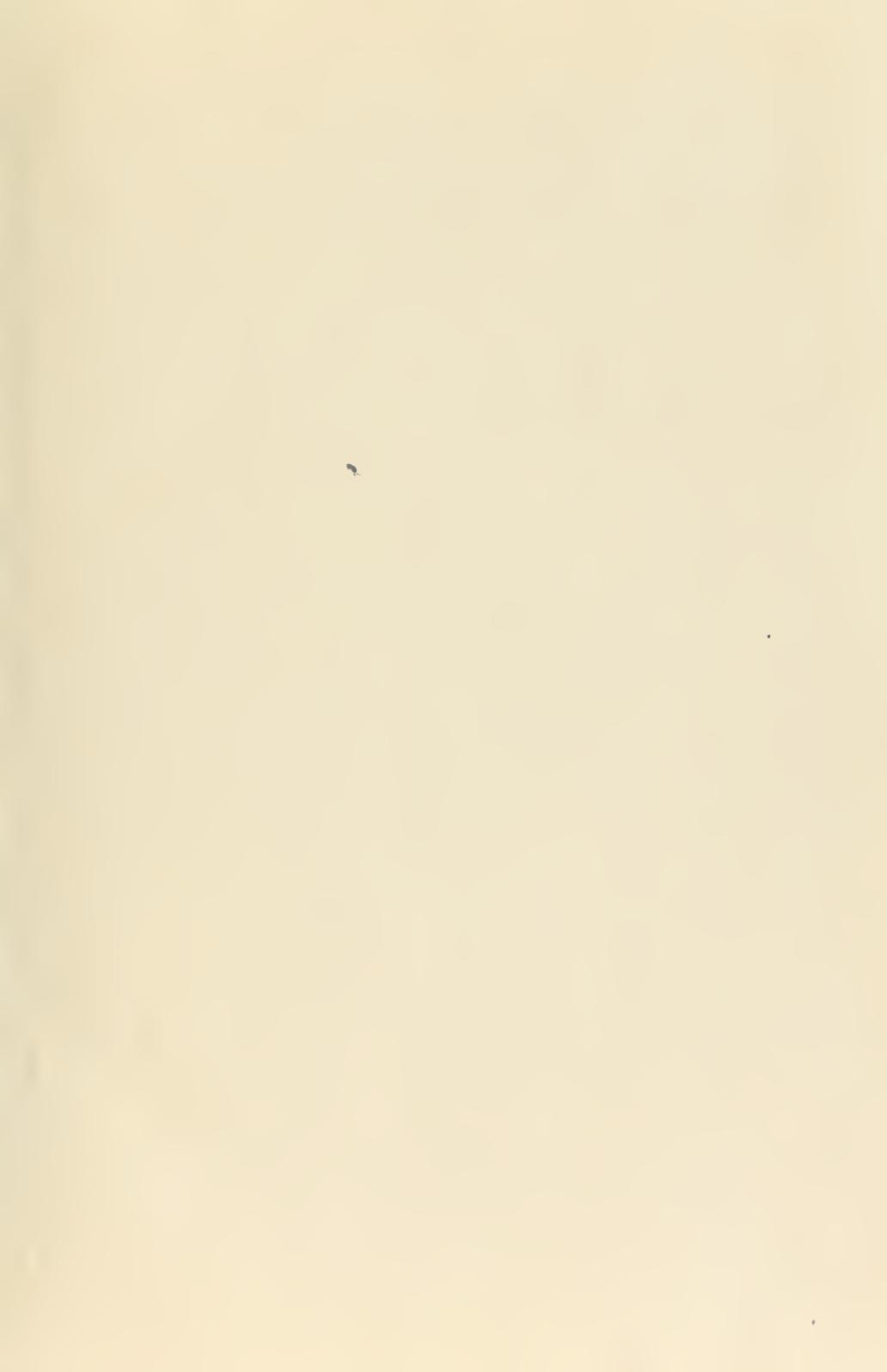
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United States 1107
Circuit Court of Appeals
For the Ninth Circuit.

MUTUAL OIL COMPANY, a Corporation,
Appellant,

vs.

H. G. HILLS,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Montana.

Filed

JUL 6 - 1917

F. D. Monckton,
Clerk.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors of Record.

FLETCHER MADDOX, Esq., of Great Falls, Montana, I. W. CHURCH, Esq., of Great Falls, Montana, and S. D. BISHOP, Esq., of Lawrence, Kansas,

Solicitors for Defendant and Appellant.

Messrs. FREEMAN & THELEN, of Great Falls, Montana, Messrs. NORRIS & HURD, of Great Falls, Montana,

Solicitors for Plaintiff and Appellee. [1*]

*In the District Court of the United States in and for
the District of Montana.*

IN EQUITY—No. 43.

H. G. HILLS,

Plaintiff,

vs.

MUTUAL OIL COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on April 21, 1915, the plaintiff filed his amended complaint herein, in the words and figures following, to wit: [2]

*In the District Court of the United States in and for
the District of Montana.*

H. G. HILLS,

Plaintiff,

versus

MUTUAL OIL COMPANY, a Corporation,

Defendant.

*Page-number appearing at foot of page of original certified Transcript of Record.

Amended Complaint.

Now comes the above-named plaintiff, leave of Court having first been obtained therefor and files this, his amended complaint, and dismissing from said cause the defendant, J. R. Greenlees, mentioned in plaintiff's original complaint and for plaintiff's cause of action against the defendant, Mutual Oil Company, alleges:

I.

That the defendant, Mutual Oil Company, during all the times hereinafter mentioned has been and now is a corporation duly organized and existing under and by virtue of the laws of Arizona for the purpose, among others, of marketing kerosene, gasoline, oil and other products of petroleum, and at all times since on or about the first day of January, 1910, has been and now is carrying on said business in the State of Montana and that at all the times herein mentioned the principal place of business of said defendant has been and now is at the City of Lawrence in the State of Kansas.

II.

That in the month of December, 1909, the said defendant, which had not theretofore been engaged in said business in Montana, began to make arrangements to market kerosene, [3] gasoline, oil and other products of petroleum in said State; that at all times mentioned herein prior to the commencement of this action, one J. R. Greenlees was the president of the defendant; that said defendant, prior

to the eighteenth day of December, 1909, authorized said J. R. Greenlees to make all arrangements and preparations necessary to enable said defendant to engage in the business of marketing kerosene, gasoline, oil and other products of petroleum in the State of Montana and entrusted to said J. R. Greenlees the entire supervision, management and control thereof.

III.

That the plaintiff for more than twenty years previous to the 18th day of December, 1909, had been in the employ of the Continental Oil Company in various capacities and was on the last-mentioned date, the manager of the said company at Great Falls, Montana, and was thoroughly acquainted with all phases of said business and particularly the selling and marketing part thereof, and that said plaintiff enjoyed the confidence of his said employer and was in line of promotion to the position of State manager thereof in and for the State of Montana; that on and before the said 18th day of December, 1909, the said defendant was well aware of plaintiff's ability to handle the oil business and knew of his long years of connection with the Continental Oil Company as an employee and of his standing with the said company.

IV.

That on or about said 18th day of December, 1909, and as a part of its arrangement and preparation to engage in said business, the said J. R. Greenlees acting for said defendant sought out this plaintiff

at Great Falls, Montana, and entered into negotiations with him for the purpose of inducing him to terminate his relations with the said Continental [4] Oil Company at Great Falls, Montana and to assume charge of the said business of the defendant in that part of Montana hereinafter described as the Great Falls District, and it was represented by said Greenlees to plaintiff that its district managers must be and become holders of its capital stock; that said negotiations between the plaintiff and the defendant as aforesaid, resulted in the making and entering into of an agreement, a partial memorandum of which, marked Exhibit "A," and by this reference made a part hereof is hereto attached, under and by the terms of which said agreement, it was stipulated and agreed by and between the plaintiff and the defendant, that the said plaintiff was employed by said defendant as manager of the business of said defendant in the Great Falls District hereinafter described, for such period of time as said plaintiff should be in good health and be able to give his attention to the management, supervision and control of said defendant's business in such district and that as compensation therefor, said defendant agreed to pay to the plaintiff the sum of one hundred twenty (120) dollars per month, payable monthly and the sum of five per cent of the net earnings of the business done by said defendant in such district and it was further agreed and stipulated by and between the plaintiff and the defendant that the plaintiff should purchase of and from the defendant and plaintiff did purchase of said defendant, thirty

shares of the capital stock of defendant, for the sum of one hundred (100) dollars per share and that said plaintiff should and he did make, execute and deliver to the defendant, his promissory note for the sum of three thousand (3,000) dollars, payable on or about July 1st, 1911, in payment for thirty (30) shares of the capital stock of said defendant, the certificates for which were to be issued by the defendant and delivered to [5] the plaintiff whenever said note was paid and it was agreed and stipulated by and between the plaintiff and the defendant, that the defendant should apply in payment of said note, all dividends which said thirty shares of said stock might or should earn after the 18th day of December, 1909, and the said five per cent of the net earnings of the business done by said defendant in the Great Falls District, which application of said sum should continue to be made in payment of said note until said note was fully paid and that in the event said note was not paid by the application of said monies thereupon prior to the maturity thereof, then a renewal note for whatever sum remained owing to said defendant should be made, executed and delivered by said plaintiff and that after said note or renewal note was so paid the dividends, which said thirty shares of said stock might thereafter earn and the said five per cent of the net earnings of the business done by defendant in said district, should be delivered and paid by the defendant to the plaintiff.

V.

That the said Great Falls District so designated

by said defendant, included all stations, towns and cities and the territory tributary thereto along the lines of the Great Northern Railway Company between the North Dakota-Montana State line and the Montana-Idaho State line and between and including the city of Havre and the town of Wolf Creek and between and including the towns of Judith Gap and Shelby and between and including the towns of Armington and Neihart, all of said points being on the main or branch lines of the Great Northern Railway Company in the State of Montana.

VI.

That on or about the 19th day of January, 1910, the plaintiff entered upon and commenced to discharge the duties [6] as manager of said defendant in said district and continued as such manager and thereafter performed all the duties of his said position until on or about the first day of March, 1913, on which said date, the defendant, without any cause, reason or excuse whatsoever, discharged the plaintiff as its manager and has at all times since refused to employ him as such manager.

VII.

That upon his information and belief the plaintiff alleges, that since the 19th day of January, 1910, five per cent of the net earnings of the defendant upon business done by it in the said Great Falls District, has been at least three thousand (3,000) dollars per year and that in the future and during the time said plaintiff may reasonably expect to be able to give attention to said defendant as its manager in said district, to wit, for the period of at least fifteen years

from and after the date of the commencement of this action, the plaintiff, upon his information and belief, alleges that five per cent of the net earnings of said defendant in said district will be the sum of at least five thousand (5,000) dollars per year.

VIII.

That upon his information and belief, the plaintiff alleges, that since the first day of January, 1910, the dividends which the stock of said defendant has earned has been not less than one hundred per cent or the sum of one hundred (100) dollars per share, and that the market value of said stock of the defendant at the time of the commencement of this action is not less than two hundred (200) dollars per share.
[7]

IX.

That on or about the 11th day of July, 1911, the defendant required of the plaintiff that the plaintiff execute and deliver to the defendant, plaintiff's promissory note in the sum of three thousand (3,000) dollars, payable eighteen months after the date thereof as and for a renewal of the first note hereinbefore mentioned, and said plaintiff did, on or about said date, make and execute and thereafter deliver to the defendant such promissory note.

X.

That upon his information and belief, said plaintiff alleges that since the first day of January, 1910, the dividend earned by said thirty shares of stock and five per cent of the net earnings of the defendant in said Great Falls District have been greatly in excess of the sum of three thousand (3,000) dollars, the

sum owing the defendant by the plaintiff upon the aforesaid promissory note, and that long prior to the commencement of this action, said note by the method aforesaid, was fully paid, satisfied and discharged and that said defendant should have canceled said note and the renewal note thereof and returned the same to the plaintiff and should have issued to the plaintiff certificate for thirty shares of the capital stock of said defendant and thereafter should have paid to the plaintiff large sums of money as dividends upon said stock and large sums of money representing the five per cent of the net earnings upon business done by the defendant in said Great Falls District, but said defendant has at all times refused and now refuses to cancel and surrender to said plaintiff said note and renewal note or to deliver to said plaintiff certificates for said thirty shares of stock or to account for and pay to said plaintiff dividends earned upon said stock or five per cent of the net [8] earnings of business done by the defendant in said Great Falls District.

XI.

That heretofore the business of said defendant has rapidly increased from year to year and upon his information and belief, plaintiff alleges that it will rapidly increase from year to year in the future and that the stock of said defendant will earn large dividends, the exact amount of which cannot by the plaintiff be estimated and the stock of said defendant by reason thereof will greatly and rapidly increase in value; that there is only a limited amount of said stock issued by said company and that it is not for

sale upon the market and cannot rapidly be purchased and that said thirty shares of stock herein mentioned are now of a special and peculiar value and that it is impossible to determine the actual damage which plaintiff will sustain if said stock is not by the defendant delivered to him, and upon his information and belief plaintiff alleges that defendant has sufficient capital stock to carry out the agreement and to deliver to him thirty shares thereof and said plaintiffs ask for a specific performance of said agreement as to said stock.

XII.

That plaintiff has no means of ascertaining the net earnings of said defendant upon business done by it in said Great Falls District prior to the commencement of this action or at any time; that prior to the commencement of this action plaintiff demanded of the defendant that said defendant account to and with the plaintiff for five per cent of the net earnings of the business done by said defendant in said district; that plaintiff has demanded of defendant all dividends earned by said thirty shares of stock and an accounting by the defendant to and with the plaintiff for said dividends; [9] that said defendant has at all times declined, failed and refused and now declines, fails and refuses to account to and with the plaintiff for five per cent of said net earnings or any part thereof and said dividends or any part thereof in payment of said note and said renewal note.

XIII.

That said plaintiff has duly performed all the terms and conditions of said agreement to be by him per-

formed and has at all times been and now is able and willing to perform all of the terms and conditions of said agreement on his part to be performed after the first day of March, 1913, and at all times in the future.

XIV.

That if the five per cent of the net earnings of business done by said defendant in said Great Falls District, together with the accruing dividends on said stock is not sufficient to pay to the defendant, the amount due on said thirty shares of stock, said plaintiff is ready, willing and able and hereby offers to pay the difference in money.

XV.

That during the months of July to December, both inclusive, in the year 1911, said defendant without any authority so to do and in violation of said agreement, withheld from plaintiff the sum of twenty (20) dollars per month out of the sum of one hundred twenty (120) dollars per month, which said defendant agreed to pay said plaintiff as a part of said plaintiff's compensation for services rendered said defendant as manager of its said Great Falls District, which sum plaintiff demanded of defendant and defendant has at all times refused to pay to said plaintiff the said sum of twenty (20) dollars each for said months amounting to the sum of one hundred twenty (120) dollars, which is now due, owing and [10] unpaid by and from the defendant to the plaintiff.

WHEREFORE, the plaintiff demands judgment against the defendant,—

I.

That said defendant be required to transfer to the plaintiff thirty shares of the capital stock of the Mutual Oil Company and if for any reason said specific performance of said agreement cannot be had, then that the plaintiff have judgment for the value thereof, together with damages assessed thereon at three times the value of said stock for wilful failure to perform the terms of said contract.

II.

That the defendant be required to account to the plaintiff for five per cent of the net earnings of business done by said defendant in said Great Falls District from the 19th day of January, 1910, to the date of the trial of this action and to pay to the plaintiff any sum found due him after said accounting has been had.

III.

That the defendant be required to account to and with the plaintiff for all dividends earned by thirty shares of said stock and that said amount be applied in payment of said plaintiff's note or if the amount thereof be not sufficient to pay said note, that defendant be required to accept from the plaintiff the balance found to be due and owing from said plaintiff to the defendant for said shares of stock.

IV.

That if the sums found to be due to the plaintiff as dividends upon said stock and five per cent of the net earnings of business done by the defendant in said Great Falls District are in excess of the amount due upon said promissory notes executed by the plaintiff

and delivered to the defendant [11] that said defendant be required to deliver up and surrender to the plaintiff, duly canceled, said note and said renewal note.

V.

For the sum of one hundred twenty (120) dollars with interest thereon at the rate of eight per cent per annum.

VI.

For such other and further relief as to the court may seem equitable, meet, just and proper, including plaintiff's costs and disbursements incurred in and by reason of this action.

FREEMAN & THELEN and
NORRIS & HURD,

Solicitors for the Plaintiff. [12]

State of Montana,
County of Cascade,—ss.

H. G. Hills, first being duly sworn, deposes and says: That he is the plaintiff in the foregoing entitled action; that he has read the foregoing amended complaint, knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon his information and belief and as to those he believes it to be true.

H. G. HILLS.

Subscribed and sworn to before me this 20th day of April, 1915.

[Notarial Seal] EDWIN L. NORRIS,
Notary Public for the State of Montana, Residing at
Great Falls, Montana.

My commission expires Oct. 6, 1916.

Service of the foregoing complaint by receipt of a copy thereof is hereby admitted this 20th day of April, 1915.

S. D. BISHOP,
FLETCHER MADDOX,
I. W. CHURCH,

Attorneys for Defendant. [13]

**Exhibit "A" Attached to Amended Complaint—
Agreement Dated 12-18, 1909, Between H. G.
Hills and Mutual Oil Co.**

Gt. Falls, Mont., 12-18, 1909.

Whereas I have this day executed a note to the Mutual Oil Co. of Lawrence, Kansas, for \$3,000.00, same being given for 30 shares of \$100.00 each of the common stock of the Mutual Oil Co. It is hereby agreed that the dividends accruing on this stock together with my share of the net earnings of the Gt. Falls district, same being 5 per cent as set out in one certain contract shall be applied on said note until same is fully paid. The above shares of stock to be then delivered to me together with the canceled note by the Mutual Oil Co. Should this note not be fully paid in this manner when due it is agreed that a new note for the balance then due shall be executed to be held in the same manner until fully paid. The old note to be cancelled and returned.

H. G. HILLS.

MUTUAL OIL CO.

By J. R. GREENLEES, Pt.

[Endorsed]: Filed April 21, 1915. Geo. W. Sproule, Clerk of U. S. Dist. Ct. [14]

Thereafter, on June 4, 1915, Answer to Amended Complaint was duly filed herein, in the words and figures following, to wit: [15]

[Title of Court and Cause.]

Answer to Amended Complaint.

Answer of the defendant Mutual Oil Company, a corporation, to the plaintiff's amended bill of complaint herein.

This defendant reserving the benefits of all exceptions that may be taken to the insufficiency of the plaintiff's said bill of amended complaint, answering says:

1. That it admits the averments in said bill of complaint set forth in paragraph 1 thereof.

2. That it admits that in the month of December, 1909, it began to make arrangements to market kerosene, gasoline, oil and other products of petroleum, in the State of Montana, but denies that at all times prior to the commencement of this action one J. R. Greenlees was the president of the defendant company, but avers the truth to be that the said J. R. Greenlees ceased to be the president of the said defendant company in the year 1914 and long prior to the filing of plaintiff's original bill of complaint. And further denies that prior to the 18th day of December, 1909, or ever or at all, it authorized the said J. R. Greenlees to make all or any arrangements or preparations necessary to enable it to engage in its said business in the State of Montana, as alleged, or that it entrusted to the said Greenlees the entire, or any,

supervision, management, or control of such arrangements or preparations as alleged by the plaintiff.

3. That it admits that prior to the month of December, [16] 1909, the plaintiff had been for many years in the employ of the Continental Oil Company, but as to all other matters alleged in paragraph 3 of plaintiff's complaint defendant says that it has no knowledge thereof.

4. That it admits that on or about the 18th day of December, 1909, the said Greenlees met the plaintiff at Great Falls, Montana, and employed him in the capacity of a manager of the business of the defendant company, in what was described in the plaintiff's complaint as the Great Falls District, at a salary of \$120 per month, but defendant says that in so doing the said Greenlees acted upon his own responsibility and without previous sanction or authority on the part of the defendant company. And defendant further says that the said salary of \$120 a month was the only consideration offered by the said Greenlees to the plaintiff as an inducement for him to terminate his relations with the said Continental Oil Company and that the said plaintiff was at all said times ready and willing in consideration of the said salary to terminate his employment with the Continental Oil Company in the hope and expectation of securing in due time, as his services might warrant or justify, promotion in the service of the defendant company which had been withheld and denied to him by the said Continental Oil Company. That as to the truth of the averment that it was represented by the said Greenlees to plaintiff that its district

managers must be and become holders of its capital stock said defendant has no knowledge, but says that if any such representation was made it was untrue and unauthorized by the defendant. Defendant further says that plaintiff entered its employ on or about the 19th day of January, 1910, as its local manager and as such had charge of defendant's business in the city of Great Falls until some time during the month of February, 1913, at which time the plaintiff was discharged by this defendant as its resident agent and [17] manager at Great Falls and was thereafter employed by this defendant as a clerk in its office at said city at a salary of \$100 a month until the filing of this action, at which time plaintiff was discharged.

5. That it denies that on or about the 18th day of December, 1909, or ever or at all, any negotiations were had between the plaintiff and defendant that resulted in the making or entering into of an agreement of which the said Exhibit "A" referred to in paragraph 4 of plaintiff's complaint was a partial or any memorandum whatever; or that any agreement, in writing or otherwise, was ever entered into between the plaintiff and defendant under or by the terms of which it was stipulated or agreed that the plaintiff was employed by the defendant as manager of the business of the defendant in said Great Falls district for such period of time as plaintiff should be in good health or able to give his attention to the management, supervision or control of defendant's business in such district, or for any other specified or designated period of time whatsoever. Denies

that as compensation for such alleged employment the defendant agreed to pay the plaintiff the sum of \$120 per month and the sum of 5, or any, per cent of the net, or any, earnings of the business done by the defendant in said Great Falls District. Denies that it was ever agreed or stipulated by and between the plaintiff and the defendant that the plaintiff should purchase of or from the defendant, or that the plaintiff did purchase of the defendant 30, or any, shares of the capital stock of the defendant for the sum of \$100 per share, or any other sum, or that the plaintiff should, or that he did make, execute or deliver to the defendant, his promissory note for the sum of \$3,000, payable on or about July 1st, 1911, or any note whatever in payment for 30, or any, shares of the capital stock of this defendant. Or that the certificates for said alleged [18] shares of stock were to be issued by the defendant or delivered to the plaintiff whenever said note was paid, or ever, or at all. Denies that it was agreed or stipulated by and between the plaintiff and the defendant that the defendant should apply in payment of said alleged note, all or any, dividends which said 30, or any, shares of said stock might, or should earn after the 18th day of December, 1909, or from any other date or at all, or the said alleged 5 per cent of the net earnings of the business done by said defendant in the said Great Falls district. Denies that the application of said alleged, or any sums whatever should continue to be made upon said alleged note until the same was fully paid, or that in the event said alleged note was not paid by the application of said moneys prior to the

maturity thereof that a renewal note should be made for any sum remaining due. Or after said alleged note or renewal note was so paid the dividends which said 30, or any, shares of said stock might thereafter earn, or the said alleged 5 per cent of the net earnings of the business done by defendant in said Great Falls district should be delivered or paid by the defendant to the plaintiff.

6. That it denies that it ever made or executed the writing or memorandum marked Exhibit "A," and attached to plaintiff's complaint, or that it ever authorized its president, J. R. Greenlees, to execute said writing, or that it ever ratified, confirmed, or approved the act of said Greenlees in assuming to execute said writing on behalf of the defendant, but on the contrary, alleges the truth to be that the said Greenlees executed said writing upon his own responsibility and without previous authority from the defendant or its board of directors. And the defendant further shows to this Honorable Court, and alleges the fact to be that the management and control of the business of the defendant, and the power to transact the same is vested in its [19] board of directors, and that the defendant, by its board of directors, never authorized, ratified, or confirmed the employment of the plaintiff upon the terms, or any of the terms, set forth in said Exhibit "A," and that said board of directors never authorized, ratified, or confirmed the execution of the alleged memorandum Exhibit "A" in any manner whatever, and had no knowledge of the execution of the same until a long time thereafter, and that when defendant did

learn of the existence of said pretended contract, and that plaintiff pretended to claim rights thereunder, it promptly notified plaintiff of its repudiation and nonratification of the same.

7. Further answering the defendant alleges upon information and belief that the plaintiff, at the time of the execution of said writing marked Exhibit "A" by said J. R. Greenlees, was fully informed by him that said writing was executed without authority of the board of directors of the defendant, and that the same before it would have any legal or binding effect would have to be ratified, and confirmed by the said board of directors. And defendant further shows to this Honorable Court, and avers the truth to be that it was fully understood and agreed between plaintiff and the said J. R. Greenlees that the writing, Exhibit "A," was to be regarded as a temporary and informal memorandum and that its terms were to be embodied in a formal contract setting out more fully and in legal form the proposed arrangement under which the plaintiff should enter the employment of the defendant. That immediately thereafter such formal contract was drawn up, but the same was not executed, or attempted to be executed by the said Greenlees in behalf of the defendant, but the same was forwarded to the defendant at its home office, in Lawrence, Kansas, for the consideration and approval of the board of directors, and for execution, if so approved. That the necessity of such approval, or ratification by [20] the said board of directors of the defendant was one of the reasons why said writing Exhibit "A" was not regarded by plaintiff

and said Greenlees as a final agreement covering the proposed contract of employment, but it was well understood that the second and formal contract was to be drawn up, not alone for the purpose of having the same in legal form, but to give the board of directors of the defendant an opportunity to consider said contract, and approve it, and authorize its execution, should they so decide to do, all of which plaintiff well knew and understood. That the defendant did not approve, execute or ratify, in any manner, said second proposed contract. And defendant further alleges that the plaintiff entered the employ of the defendant on or about the 19th day of January, 1910, one month after said second proposed contract had been forwarded to the defendant's office at Lawrence, Kansas, well knowing at the time that said contract had not been approved, or its execution authorized by the defendant's board of directors, and well knowing that ample time had elapsed for action on the part of said board of directors in respect to said proposed contract.

8. That it admits that the plaintiff entered the employ of the defendant company on the 19th day of January, 1910, and rendered services as its manager in said Great Falls district until about the 1st day of March, 1913, when he was discharged. Denies that plaintiff was discharged without cause, reason or excuse as alleged in paragraph 6 of plaintiff's complaint, but on the contrary, alleges that plaintiff was discharged because of his incompetency and inability to properly or satisfactorily perform the duties of his employment.

9. Defendant says that if the plaintiff executed and delivered to the defendant his promissory note for \$3,000 as alleged in paragraph 4 of his complaint, or if he executed and delivered to the defendant his renewal note for \$3,000 as [21] alleged in paragraph 9 of his complaint, that the execution and delivery of said note, or either of them, were without the knowledge, consent or authority of the board of directors of this defendant, and that this defendant has not, in any manner, ratified or confirmed the execution of said note to it on the part of said plaintiff, or ratified or confirmed, in any manner, the renewal of said note. And further alleges the fact to be that this defendant or its board of directors have never authorized any of its officers to receive in payment for its stock, the aforesaid note, and has never authorized any of its officers to obtain a renewal of said note, and if such were done, the same was done without the knowledge or consent of this defendant, or of its board of directors. And this defendant says that if said notes are now in the possession of, or under the control of this defendant, or of its board of directors, or any of its officers, agents or employees, it now offers to return said notes to the plaintiff or to bring said notes into court for such disposition of same as this Honorable Court may direct.

SECOND.

Further answering and for a second defense defendant alleges and shows unto this Honorable Court: That the contract set out in plaintiff's complaint wherein the defendant is alleged to have

agreed to permit the plaintiff to become the owner of 30 shares of the capital stock of the defendant by an arrangement whereby the stock was to automatically pay for itself with its own dividends is illegal and void and beyond the power of the defendant, or its board of directors, or any of its officers, to make or enter into, in that the arrangement alleged to have been so entered into was, in effect, a gift of such stock to the plaintiff, and as such, a fraud upon the rights of all other stockholders and in violation of law and the by-laws of the defendant [22] company.

That the contract set out in plaintiff's complaint wherein the defendant is alleged to have agreed to pay the plaintiff five per cent of the net earnings of the business done by the defendant in said Great Falls district for an indefinite period, or as long as plaintiff remained in good health and able to give his attention to the management of defendant's business, was illegal and void in law and beyond the power of the defendant, or its board of directors, or any of its officers to make or enter into, in that it proposed to divert and withhold from the treasury of the company a part of its assets or income without the knowledge or consent of the stockholders of the defendant company. That the payment or said 5 per cent of said net earnings would constitute a fraud upon the stockholders of the defendant company. That said agreement so alleged to have been made between the plaintiff and the said J. R. Greenlees, assuming to act for the defendant company as to the purchase of the 30 shares of stock and the 5 per cent

of the net earnings of said district was a proposed diversion and misuse of the capital stock and assets of the defendant not authorized by law and was without the authority, knowledge or consent of the board of directors of the defendant company and beyond their power to ratify or confirm, and when said pretended and proposed agreement was brought to the attention of the board of directors of the defendant it refused to confirm or ratify the same and promptly notified the plaintiff of its repudiation and non-ratification thereof.

THIRD.

Further answering and for a counterclaim against the plaintiff this defendant alleges:

That the services of said plaintiff as its resident agent and manager at Great Falls, Montana, were not satisfactory to defendant and that said plaintiff was grossly incompetent in [23] transacting the business of said defendant at Great Falls, Montana, and was guilty of a culpable degree of negligence in this, to wit: That from the beginning of his employment, the plaintiff disregarded defendant's instructions relative to making purchases in equipping stations and purchased equipment at higher prices, when he was advised that said equipment and material could be purchased at lower prices elsewhere.

That plaintiff was in the habit of making a large number of drafts upon the defendant and gave no accounting or furnished no vouchers showing the disposition of the funds derived therefrom, for months thereafter. That defendant, at one time, received a large number of invoices covering a large number of

purchases with no list or statement covering said bills. That after said bills were listed, the account showed that about \$600.00 had been sent to plaintiff for which he could not account by voucher or money on hand. That this defendant was obliged to hold up plaintiff's salary until this amount had been made good out of the same. That at the very beginning, the plaintiff handled and managed the defendant's business in a very loose and unbusinesslike manner; that he was not willing to make a record of any kind showing the transactions or the business of defendant or make proper reports thereof, and that the plaintiff would order an unreasonable quantity of goods, which said orders, had the defendant honored, would have stocked the defendant in such quantities that a large amount of goods would have remained on hand and unsold in the possession of the defendant. That the plaintiff represented to the defendant that practically all of the business would be done on a cash basis in the Great Falls District, but after the defendant had equipped its stations and stocked and prepared to do business, and had gone to great expense in the matter, then the plaintiff advised the defendant that it would be necessary to extend credit with the result that practically all of the defendant's [24] goods were sold on a long time credit; that poor judgment was exercised by the plaintiff in extending said credit in spite of repeated caution to the effect that credit should only be extended on accounts that were absolutely good. That plaintiff paid no heed to the

instructions of the defendant, and a large amount of money was lost through the failure and negligence of the plaintiff herein in giving and granting to customers who could not meet their bills when due or at any time thereafter. That the amount of poor uncollectible bills made through the negligence of the plaintiff herein which have been charged off by the defendant amount to approximately \$17,500.00; that in many cases, the plaintiff was advised not to extend credit to those customers as the investigation of the defendant showed that they were not entitled to credit. That the plaintiff negligently and carelessly paid no attention whatever to the instructions of the defendant and in some cases credit was extended to the extent of \$500.00 or \$600.00, which amounts were lost, and had to be charged off as bad accounts. That by reason of the negligent acts above alleged, and the plaintiff's willful disregard of this defendant's instructions, it was obliged to relieve and discharge said plaintiff as its resident agent and manager as herein before alleged. That by reason of the carelessness of said plaintiff as herein alleged, his willful disregard of defendant's instructions and his incompetency to transact defendant's business, this defendant sustained a loss in the sum of about \$17,500.00.

This defendant, therefore, prays that it have judgment against said plaintiff for costs and for such

sum and for such other relief, legal or equitable, as this Court may deem just.

FLETCHER MADDOX,
S. P. BISHOP and
I. W. CHURCH,

Solicitors for Defendant, the Mutual Oil Company.

[25]

State of Montana,
County of Cascade.

I. W. Church, being first duly sworn, deposes and says: That he is one of the solicitors for the defendant Mutual Oil Company. That the said defendant is a corporation and there is no officer of said corporation now within the County of Cascade where affiant resides, and that the matters stated in the foregoing answer are true to the best knowledge, information and belief of affiant.

I. W. CHURCH.

Subscribed and sworn to before me this 2d day of June, 1915.

[Notarial Seal] ALBERT W. HEIDEL,

Notary Public in and for Cascade County, State of Montana.

Notary Public for the State of Montana, Residing at Great Falls, Montana.

My Commission expires Jan. 19, 1918.

Service of copy of foregoing answer admitted this 3 day of June, 1915.

FREEMAN & THELEN and
NORRIS & HURD,

Solicitors for Plaintiff.

[Endorsed]: Filed June 4, 1915. Geo. W. Sproule,
Clerk. [26]

Thereafter, on July 1, 1915, reply was duly filed
herein, in the words and figures following, to wit:
[27]

[Title of Court and Cause.]

**Reply of Plaintiff to Answer of Defendant to
Amended Complaint of Plaintiff.**

Comes now the plaintiff and for reply to the answer of defendant to the amended complaint of the plaintiff herein, admits, denies and alleges, as follows:

I.

For reply to paragraph 7 of the first defense of defendant set forth in its answer, the plaintiff admits that the writing set forth in the amended complaint of plaintiff and marked Exhibit "A," was to be regarded as a temporary and informal memorandum and that the terms of said writing were to be embodied in a formal contract setting out more fully and in regular form the arrangements made and contract entered into between the plaintiff and the defendant herein as set forth in said paragraph 7, and denies each and every other allegation, fact, matter and thing contained in said paragraph.

II.

For answer to paragraph 8 of the first defense contained in said answer, the plaintiff denies that he was discharged by the defendant herein from the employment of said defendant by reason or because

of his incompetency and inability to properly or satisfactorily perform the duties of his employment [28] or that he was discharged by reason of any incompetency or inability on his part and alleges that said discharge was not by reason or any cause over which he had any control.

III.

That plaintiff replying to paragraph 9 of the first defense contained in said answer denies each and every allegation, fact, matter and thing set forth therein.

IV.

The plaintiff replying to the second defense set forth in the answer of defendant, designated as paragraph second, denies each and every allegation, fact, matter and thing set forth in said defense.

V.

The plaintiff replying to the further answer and counterclaim of the defendant, set forth in its said answer and designated therein as paragraph Third, denies each and every allegation, fact, matter and thing therein contained.

WHEREFORE, having replied to the answer of said defendant, the plaintiff prays as in his complaint set forth.

FREEMAN & THELEN,
NORRIS & HURD,

Attorneys and Solicitors for Plaintiff. [29]

State of Montana,
County of Cascade,—ss.

H. G. Hills, being first duly sworn, deposes and says: That he is the plaintiff named in and who

makes the foregoing reply; that he has read the said reply and knows the contents thereof and that the same is true of his own knowledge.

H. G. HILLS.

Subscribed and sworn to before me this the 29th day of June, 1915.

[Notarial Seal]

H. C. HALL,

Notary Public for the State of Montana, Residing at Great Falls, Montana.

My Commission expires Nov. 14, 1917.

Service of a copy of the foregoing reply is admitted this the 30th day of June, 1915.

S. D. BISHOP,

I. W. CHURCH and

FLETCHER MADDOX,

Solicitors for Defendant.

[Endorsed]: Filed July 1, 1915. Geo. W. Sproule, Clerk. [30]

That on January 13, 1917, the opinion of the Court was duly filed herein, in the words and figures following, to wit: [31]

United States District Court, Montana.

No. 43.

H. G. HILLS,

vs.

MUTUAL OIL CO.

Opinion.

This suit is for specific performance of a contract for the sale of corporate stock (part of an employ-

ment contract), and for accounting and other incidental relief.

The complaint alleges facts sufficient to invoke equity jurisdiction to that end, and there is no denial in the answer. From the evidence it is found that on Dec. 18, 1909, plaintiff and defendant, an Arizona corporation of that year, entered into a contract that plaintiff would become local manager for defendant, to establish, build and conduct local stations at Great Falls and elsewhere in Montana, for the sale and distribution of oil, so long as he was in good health and attentive to business, for compensation of \$120 per month and 5% of the net earnings of the managed territory; and also that plaintiff would buy of defendant thirty shares of its common stock, giving therefor his note for \$3,000 to be paid by application of dividends accruing and said 5%. There is conflict here, plaintiff testifying the contract was so made; Greenlees, defendant's *de facto* president, who conducted the negotiations with plaintiff, that it was contingent on approval by defendant's directors. In view of all the circumstances, which version is true, is not very material for by estoppel and ratification, conduct served equally as would have the board's express approval. However, circumstances sustain plaintiff.

Defendant had no directors until June, 1910. Before that, Greenlees had promoted defendant, was its "moving spirit" and "practical head," assumed to be president, made his office its office, alone transacted all its business in establishing it as he did [32] as a going concern, alone was actively engaged

therein, sustained it with his money and credit, borrowed money on its credit supported by his personal endorsement of its notes by him executed and its collateral by him pledged, and in all things did all the corporation could do. Of force and ability, Greenlees neither was offered nor received directions from anyone. He made all defendant's contracts and submitted them to no one. And his co-incorporations knew and acquiesced in all this. He was the corporation. His co-incorporators, as they individually chanced to meet him, may have inquired of progress and received some general information, but that is all.

The attempt to cloak Williams, hired by Greenlees as secretary for defendant, with superior or any material authority, fails. Furthermore, the parties intended the contract to take immediate effect. Plaintiff's note was delivered Dec. 18, 1909, to Greenlees for defendant, and plaintiff actively entered on the service about Jan. 19, 1910, and continued therein some three years without any action by the directors. That contemporaneous with the negotiations part of the contract was dictated to an attorney and later reduced to writing by him, and by plaintiff, after entering on the service, received and transmitted to Greenlees with leave to redraft to the latter's satisfaction, is comparatively unimportant. Nor was reduction to writing a condition precedent, but if it was, it was waived and performance entered upon. And altho the incorporators, and directors later, knew Greenlees had "made some arrangement" with plaintiff, altho plaintiff's note

was pledged by Greenlees for defendant prior to creation of the board and renewed and later by defendant repledged, altho in March, 1910, plaintiff's application for a fidelity bond, containing enough to apprise of the "arrangement" went thru defendant's office and was signed by its secretary, altho the attorney's draft sent to Greenlees became known to defendant's secretary and directors, and altho plaintiff continued service, the directors with express or implied knowledge thereof took no adverse action; and no one even suggested to [33] plaintiff prior to the summer of 1912 that defendant denied the contract and would not perform it. It was then too late. If unauthorized in the beginning, it was ratified by silence, by receiving the benefits and with knowledge.

Defendant is estopped by Greenlees' habitual conduct permitted by it. All this, in view of the conclusion that the contract is not *ultra vires*.

It may be observed that it was only after defendant's business showed very large profits per share, that defendant denied the contract. To discuss the inequitableness and lack of mutuality of the contract, is useless. None appears. All the promises on one side are the consideration for all the promises on the other. It is an entire contract, and under all the circumstances was equally advantageous to both parties.

Lack of mutuality in enforceability is immaterial after substantial performance. It is contended since the stock was to be paid for "automatically" by its own earnings, this is *ultra vires*.

The contention is unsound in that it overlooks other consideration and the entirety of the contract, substantially performed.

No legal reason is perceived why a corporation may not agree to compensate a servant with part of the net earnings and also with some of its stock to be paid for as in this case.

Whether plaintiff's employment was for an indefinite term and so, at will, also is immaterial after substantial performance, save in respect to damages for discharge.

However, the term was definite. That is certain that can be made certain, as it can be and is by the happening of the stipulated contingency.

See *Pierce vs. Ry. Co.*, 173 U. S. 1, 61 N. W. 550; 32 N. E. 802; 65 N. W. 661; 15 Pick. 351.

If the complaint is sufficient to allege that the contingency upon which plaintiff's employment was to end, had not happened, that the term was not ended when he was reduced from manager to clerk on Mar. 1, 1913 (and it is doubted), there is no proof of it, nor of [34] damages subsequent to that date. His right to the 5% of the net earnings ended then, as his managership did; and he has not proven subsequent damages based on deprivation of the managership and the 5%. The evidence is plaintiff was deprived of \$20 per month for 6 months in 1911, due as salary, that 5% of the net earnings and dividends accruing on the stock, were sufficient to practically pay plaintiff's note when he was reduced in rank, and that other dividends have since accrued. It appears the parties assumed the trial would but

determine the right to an accounting. Plaintiff is entitled to a decree for the 30 shares of stock, for \$120, and legal interest, for an accounting for and to recover the 5% of the net profits to Mar. 1, 1913, and legal interest from when they should have been applied upon his note, viz., from the end of defendant's fiscal year, for an accounting for dividends accrued upon said 30 shares of stock, with their profits or legal interest (dependent on the form in which declared), from the time declared, and costs. And defendant is entitled to have the amounts so found due, applied upon plaintiff's note and interest as they should have been. The balance found will be paid to the party to whom due.

If the parties can agree, no accounting need be had.

Decree accordingly.

BOURQUIN, J.

Filed Jan. 13, 1917. Geo. W. Sproule, Clerk.
By C. R. Garlow, Deputy. [35]

Thereafter, a final decree was duly filed and entered herein, on March 17, 1917, being in the words and figures following, to wit: [36]

[Title of Court and Cause.]

Final Decree.

On this 17th day of March, 1917, appeared in the above-entitled court the above-named parties, the plaintiff being represented by his solicitors, Messrs. Freeman & Thelen and Norris & Hurd, and the defendant by its solicitors, Messrs. I. W. Church,

Fletcher Maddox, H. G. McIntire and S. D. Bishop, and said parties having exhibited to the above-entitled court the stipulation filed herein prior to the signing of this decree, which stipulation provided for the waiver of plaintiff's right to a reference and accounting and in which said stipulation the above-named parties agree that under the terms and provisions of the interlocutory decree heretofore duly made and given by the above-entitled court on the sixteenth day of February, 1917, the plaintiff, H. G. Hills, is indebted to the defendant Mutual Oil Company, a corporation, on the date of this decree in the sum of Forty-five Hundred and Two and 50/100 Dollars (\$4,502.50), and that the Mutual Oil Company, a corporation, under the provisions of said interlocutory decree is on the date hereof indebted to said H. G. Hills in the sum of Forty-four Hundred and 55/100 Dollars (\$4400.55).

And it further appearing to the Court that said facts so agreed to by the parties hereto are the facts which a reference and accounting would disclose, and the same being duly approved by the Court as and in lieu of the findings [37] resulting from a reference and accounting, and the Court in all respects being duly advised in the premises and after due consideration thereof, on motion of solicitors for the plaintiff, now ORDERS that final decree in accordance with the terms and provisions of said stipulation and said interlocutory decree be entered.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED That within thirty (30) days from the date of this final decree the de-

defendant Mutual Oil Company shall cause to be issued to and in favor of said H. G. Hills, and delivered to him a certificate or certificates of the capital stock in due form, signed and attested in the usual manner, for thirty (30) shares of the common stock of the capital stock of said defendant, Mutual Oil Company, and the defendant shall also pay to the plaintiff the plaintiff's costs and disbursements herein expended amounting to and taxed at the sum of Seventy-five and 10/100 Dollars.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the delivery of said stock to the plaintiff and the payment by the defendant to the plaintiff of the costs above mentioned the said plaintiff shall pay to the defendant the sum of One Hundred and One and 95/100 Dollars (\$101.95).

Dated this 17th day of March, 1917.

GEO. M. BOURQUIN,

Judge.

[Endorsed]: Filed March 17, 1917. Geo. W. Sproule, Clerk. [38]

Thereafter, on June 9, 1917, a statement of the evidence in said cause was duly settled and approved by the Court, being in the words and figures following, to wit:

[Title of Court and Cause.]

Statement of Evidence to be Included in Record on Appeal. [39]

[39]

In the District Court of the United States, Ninth Circuit, District of Montana.

H. G. HILLS,

Plaintiff,

vs.

MUTUAL OIL COMPANY, a Corporation,
Defendant.

Statement of Evidence to be Included in Record on Appeal.

On the trial of said cause the plaintiff introduced in evidence a duly certified copy of the articles of incorporation of the defendant company, marked Plaintiff's Exhibit 1, which is as follows, to wit:

Plaintiff's Exhibit No. 1—Copy of Articles of Incorporation of Mutual Oil Company.
DEPARTMENT OF THE SECRETARY OF
STATE
of the
STATE OF MONTANA.
CERTIFICATE.

United States of America,
State of Montana,—ss.

I, T. M. Swindlehurst, Secretary of State of the

State of Montana, do hereby certify that I have compared the annexed copy of

ARTICLES OF INCORPORATION

of the

MUTUAL OIL COMPANY

with the original thereof filed in my office on the twelfth day of September, 1909, and the same is a correct transcript, thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana this ninth day of December, A. D. One Thousand Nine Hundred and twelve.

[Seal]

T. M. SWINDLEHURST,

Secretary of State.

TERRITORY OF ARIZONA.

OFFICE OF THE

TERRITORIAL AUDITOR.

United States of America,
Territory of Arizona,—ss.

I, W. C. Foster, Territorial Auditor of Arizona, do hereby certify that the annexed is a true and complete transcript of the

ARTICLES OF INCORPORATION

of

MUTUAL OIL COMPANY. [40]

which were filed in this office on the ninth day of March, A. D. 1909 at 1:30 o'clock P. M. as provided by law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal.

Done at the city of Phoenix, the Capital, this 29th day of April, A. D. 1910.

[Seal]

W. C. FOSTER,
Territorial Auditor.

ARTICLES OF INCORPORATION
of the

MUTUAL OIL COMPANY

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned have this day associated ourselves together for the purpose of forming a corporation under the laws of Arizona, and for that purpose do adopt the following Charter:

ARTICLE I.

The name of this corporation shall be
MUTUAL OIL COMPANY.

ARTICLE II.

This company shall keep an office at Phoenix, Arizona, and may keep other principal offices and places of business at Lawrence, State of Kansas, at which place or places all incorporators', stockholders', and directors' meetings may be held, and all corporate business may be transacted.

ARTICLE III.

The amount of the capital stock of this corporation shall be \$250,000.00 Dollars, divided into 1000 shares of the par value of \$100.00 each of preferred stock, and 1500 shares of the par value of \$100.00 each of common and said capital stock shall be paid up at the date of issuance, or at such time as the Board of Directors may designate, in money, property, labor, or any other valuable right or thing, and the judgment of the Board of Directors or Man-

aging Officers as to the value thereof shall be conclusive.

ARTICLE IV.

The general nature of the business in which this corporation shall engage in is as follows, to wit:

To purchase, lease or otherwise acquire lands, mineral, oil and gas rights in Arizona or in any other state of Territory in the United States. To store, refine and transport Oil, gas and other mineral solutions, and to make reasonable charge therefor. To construct, maintain and operate pipe lines, pumping stations, tank cars, barges, storage stations, together with all fixtures and appliances needed for the operation of same, and to carry on the business of producing, refining, storing distributing and marketing petroleum products, vegetable and mineral oils, engaging in any and all kinds of business that a natural person might or could in the United States or any part of the world.

ARTICLE V.

The affairs of this corporation shall be conducted by [41] a Board of not less than 5 nor more than 9 Directors, who shall be elected on the first Monday of May of each year as the By-laws shall provide.

ARTICLE VI.

The highest amount of liability that this corporation shall subject itself to at any time shall not exceed \$150,000.00 Dollars.

ARTICLE VII.

This corporation is formed to endure for twenty-five years after its articles are duly executed, but its charter rights may be renewed (before its charter

expires) from time to time, for periods not exceeding twenty-five years at a time, perpetually.

ARTICLE VIII.

The private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations.

ARTICLE IX.

The capital stock of this corporation shall be and is hereby made forever non-assessable by this corporation for any purpose.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this 6th day of Feb. 1909.

J. R. GREENLEES. (Seal)

WILLIS K. FOLKS. (Seal)

JUNIUS UNDERWOOD. (Seal)

HUGH BLAIR. (Seal)

S. D. BISHOP. (Seal)

State of Kansas,
County of Douglas,—ss.

Before me, J. W. Howard (a Notary Public in and for said County and State), on this day personally appeared J. R. Greenlees, Willis K. Folks, Junius Underwood, Hugh Blair and S. D. Bishop known to me to be the persons who subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 6th day of February, A. D. 1909.

[Seal]

J. W. HOWARD,
Notary Public.

My commission expires on the 2d day of Jan. A. D. 1910.

Territory of Arizona,
County of Maricopa,—ss.

I, C. F. Leonard, County Recorder in and for the County and Territory aforesaid, hereby certify that I have compared the foregoing copy with the original Articles of Incorporation of MUTUAL OIL COMPANY filed and recorded in my office on the 9th day of March, 1909, and that the same is a full, true and correct copy of such original and of the whole thereof.

WITNESS my hand and seal of office, this 9th day of March, 1909.

C. F. LEONARD,
County Recorder. [42]

Filed in the office of the Territorial Auditor of the Territory of Arizona this 9th day of March, A. D. 1909, at 1:30 P. M., at request of H. R. Daggs, whose postoffice address is Phoenix, Arizona.

AIMS ELY,
Territorial Auditor.

Made A. J. S.

Compared A. M. to G. B.

[Endorsed]: Filed 12th day of Sept. 1910. A. N. Yoder, Secretary of State. By David Pizer, Deputy.

Testimony of H. G. Hills, in His Own Behalf.

The plaintiff, H. G. HILLS, being called and sworn as a witness in his own behalf, testified in substance as follows:

(Testimony of H. G. Hills.)

I live in Great Falls. Have lived here sixteen years. I first got acquainted with J. R. Greenlees in August, 1909. I was then manager of the Continental Oil Company in this city. Mr. Greenlees came in and introduced himself as President of a Producing Company in Kansas, explaining that they had decided to open a marketing end of their business; and that the men interested in the first company would practically constitute the selling company, and the name would be Mutual Oil Company; that they were planning to open a station here and later to build sub-stations; and that they were nearly ready to start business. He explained that they would need a manager here. We discussed the plan and he inquired as to whether I would accept the position, taking the profits as a salary. I replied that I would not be in a position to do that. He then agreed that the salary would be the same as I was then receiving, \$120.00 per month. That was about all that occurred in August. Nothing definite was done until December. I did not see Mr. Greenlees from the time of the August meeting until December. Before that he was a stranger to me. The time I met him in December, 1909, was about the 18th of the month. I had then been employed by the Continental Oil Company in the neighborhood of 20 years. At that time Mr. Greenlees told me that he had investigated my standing in the Continental Oil Company. I told him that he [43] knew that I stood right next to the Manager of the State. On the

(Testimony of H. G. Hills.)

18th of December, when Mr. Greenlees came into the office he asked me if I was ready to take that proposition up under the plan we considered. I said I was ready. We then discussed it as to the five (5%) per cent he would pay me from the earnings. I then said we will need a contract, because I wouldn't think of opening up this territory leaving a position of twenty years, giving my experience and then after the business was in operation have you discharge me or have your directors satisfied with not having me; and that I wanted a contract that would be as good to me as the present position. As to the length of time Mr. Greenlees or the Mutual Oil Company was employing me, that was defined in Attorney Cooper's office when Mr. Greenlees told Mr. Cooper that it was to be as long as I was in good health and attended to business. The compensation was to be five (5%) per cent of the net earnings and \$120.00 per month. At that time we had not discussed any stock. In the evening of the same day, Mr. Greenlees said he would like to have me take some stock. I told him that I was not financially able; and that I was not in a position to handle any stock. He said our people will not give any man a district unless he becomes a stockholder, because this is a Mutual Company we are organizing. Mr. Greenlees then said, perhaps, I can arrange it in this manner: I will take your note for 30 shares of the stock, which shall be paid for out of your earnings, and any dividends that will accrue to the stock, and I thought

(Testimony of H. G. Hills.)

it over awhile and agreed to it. In the evening he dictated to me this memorandum contract: Plaintiff's Exhibit 2 is a carbon copy. Mr. Greenlees took the original. I saw Mr. Greenlees write on the original "Mutual Oil Company by J. R. Greenlees, Pt."

Plaintiff's Exhibit 2 is in words and figures as follows, to wit: [44]

Plaintiff's Exhibit No. 2—Agreement Dated 12-18, 1909, Between H. G. Hills and Mutual Oil Company.

"Gt. Falls, Mont. 12-18, 1909.

Whereas I have this day executed a note to the Mutual Oil Co. of Lawrence, Kansas for \$3,000.00 same being given for 30 shares of \$100.00 each of the common stock of the Mutual Oil Co. It is hereby agreed that the dividends accruing on this stock together with my share of the net earnings of the Gt. Falls district same being five per cent as set out in one certain contract shall be applied on said note until same is fully paid. The above shares of stock to be then delivered to me together with the cancelled note by the Mutual Oil Co. Should this note not be fully paid in this manner when due it is agreed that a new note for the balance then due shall be executed to be held in the same manner until fully

(Testimony of H. G. Hills.)

paid. The old note to be cancelled and returned.

H. G. HILLS,
MUTUAL OIL CO.

By J. R. GREENLEES, Pt.”

I signed plaintiff's Exhibit 3.

Plaintiff's Exhibit 3 is as follows, to wit:

**Plaintiff's Exhibit No. 3—Promissory Note Dated
January 10, 1910, H. G. Hills to Mutual Oil
Company.**

“\$3000.00 Lawrence, Kansas, January 10, 1910.

Eighteen months after date I promise to pay to the order of Mutual Oil Company at THE LAWRENCE NATIONAL BANK Three Thousand & no/100 Dollars. Value received. With interest at 7 per annum from date, until paid.

H. G. HILLS.”

I signed Plaintiff's Exhibit 4.

Plaintiff's Exhibit 4 is as follows, to wit:

**Plaintiff's Exhibit No. 4—Promissory Note Dated
July 1, 191—, H. G. Hills to Mutual Oil Com-
pany.**

“\$3000.00 Lawrence, Kansas, July 1, 191

Six Month after date I promise to pay to the order of Mutual Oil Co. Thirty Hundred and 00/100 Dollars, Payable at its office at Lawrence, Kan. with interest at the rate of 7 per cent per annum from date until paid. Interest payable ———.

Value received. H. G. HILLS.”

When I executed Exhibit 4 on July 1st, I had received a letter from Mr. Williams signed by the Mutual Oil Company. I was advised that Mr. Wil-

(Testimony of H. G. Hills.)

liams was manager and secretary of the company at that time. The company rarely ever signed their letters by hand. They were signed by typewriting with the initials of the person writing the letter generally up in the top corner.

Plaintiff's Exhibit 5 was received in the due course of mail. I executed the note which was attached to it and sent it back. That was the note that was dated July 1st, Plaintiff's Exhibit 4.

Plaintiff's Exhibit 5 is as follows, to wit: [45]

**Plaintiff's Exhibit No. 5—Letter, July 7, 1911,
Mutual Oil Company to H. G. Hills.**

“OHW.

Lawrence, Kans., July 7, 1911.

Mr. H. G. Hills,
Great Falls, Mont.

Dear Sir:

We are handing you herewith note dated July 1st, for \$3,000 which we would like to have you sign and return us at your earliest convenience. The former note has been placed with the local bank, and it is necessary to have the note renewed.

Yours truly,
MUTUAL OIL COMPANY.”

I think Mr. Williams was made Secretary of the Mutual Oil Company February 5, 1910. Mr. Williams' letters were always initialed O. H. W. That was the custom. I knew when I received a letter with the O. H. W. initials that Mr. Williams was the author of the letter. After February 10, 1910, Mr. Williams continued as secretary of the company all the time as far as I know.

(Testimony of H. G. Hills.)

The stock earned \$71.39 up to February 1, 1913. The payment since has been three (3%) per cent made this year, but the earnings have been used as surplus. The 30 shares of stock for which I gave the note was common stock and the dividends to which I just testified was all on common stock. The earnings on the common stock so far as I know since I subscribed for it have been \$74.39 per share. The certificate for the 30 shares was never delivered to me nor were either of the notes ever surrendered to me; both of them are held by the company at this time.

At the time we were at Mr. Cooper's office to have the contract drawn Mr. Greenlees was the spokesman.

Q. And what were the terms and conditions of that agreement, with reference to compensation, and length of service?

By Mr. McINTIRE.—We object, that is a written agreement, that would be the best evidence.

By the COURT.—If he remembers it, he may state it. The document is the best evidence.

By Mr. HURD.—I want to say that a portion of that agreement was not formulated as was stated in the agreement by Mr. Cooper at [46] the time, and that the agreement submitted, or the draft of it, was only of a tentative character, subject to corrections, and it was never signed or executed by either of the parties thereto, so that we could not consent that the copy attached to the deposition was the exact understanding. I agree that there was a tenta-

(Testimony of H. G. Hills.)

tive contract prepared, and that Mr. Cooper handed it over to Mr. Hills, and he mailed them to Mr. Greenlees, who said his attorney was checking them up. The proposition we are submitting, we are not bound by that, because it is only tentative in nature, and does not contain the terms that were agreed upon by Mr. Hills and Mr. Greenlees.

By the COURT.—Were they signed, or ever accepted by either party?

By Mr. HURD.—Never accepted by either party.

By the COURT.—He may answer. If it should develop that the evidence is not competent, of course, the Court will disregard it.

Mr. Greenlees stated the situation to Mr. Cooper and asked me to define the territory which was the Great Northern system up as far as Craig and to the south from Judith Gap, taking in the main line of the Great Northern Railway from the Dakota to the Idaho line. Mr. Greenlees detailed the contract and Mr. Cooper asked when the contract would expire. Mr. Greenlees' answer was "as long as he is in good health and tends to business." The compensation was to be five (5%) per cent of the net earnings from the territory and \$120.00 a month, payable monthly. At that time we had not considered any stock, but after we did consider it the agreement, Exhibit "A," illustrates the situation. The terms of the agreement were to be reduced to writing, but when we went to Mr. Cooper's office the next morning to sign it, Mr. Cooper was busy and didn't have it ready. I got it about January 21st from the post-

(Testimony of H. G. Hills.)

office. I opened it up and saw it was a contract, and then went down to the office and wrote a letter accompanying it to Mr. Greenlees. [47]

I began work for the Mutual Oil Company about January 19th. I carried on my correspondence with the Mutual Oil Company. That began sometime after February 5th. All the business was done in the name of the Mutual Oil Company. I deposited the proceeds of the business in the Great Falls National Bank in the name of the company.

During the time I was there I put in eight stations for the company. I complied with all the terms and conditions of my agreement. The business of the company was established and running in a short time after I took up the work; every station was a success. There were net earnings by the company in this territory for 1911. The earnings were increasing every year in my territory except one year. During the summer of 1912 I made a demand upon the mutual company for an accounting. I did this personally to Mr. Williams and wrote him a letter. He did not answer the letter. Subsequently to 1912 and before the institution of this action, I did not make a personal demand on Mr. Williams or any of the officers of the company for an accounting. We were down in Kansas in 1914 for the purpose of demanding an accounting. A demand for an accounting of the five (5%) per cent was made then, but not given me. There was likewise a demand made as to the earnings of dividends on the 30 shares of stock, which was not given us.

(Testimony of H. G. Hills.)

During the period, from July 1, 1911, to January 1, 1912, they cut my salary \$20.00 per month. I have never been paid that sum. I was discharged September 1, 1914.

Cross-examination by Mr. McINTIRE.

The reason given by the company for this cut in my salary of \$20.00 per month was that the management was not satisfactory. I told them that under the agreement they didn't have any authority to cut my salary and that my management was good. During this period while my salary was reduced, I wrote them in [48] regard to it, asking when the directors would meet, so that I could go down and see them, but they never answered my letter. They stated in their letter to me that the reason for reducing my salary was because of the non-profit making of the district of which I was manager.

I went to Lawrence, Kansas, in April, 1914, Mr. Freeman accompanied me. We had discussions with the officers of the company. Our object in going was to try to get an accounting. The officers responded that Mr. Greenlees was responsible; that they would send him up here to settle. One of the directors, Mr. Fitzgerald, said that he knew about the existence of the contract; that they had talked it over; and that they had always claimed that they were going to make Mr. Greenlees settle for it. They repudiated this agreement made between Greenlees and me. They all said they repudiated it. That was the reason given by them for refusal to give an accounting as to the five (5%) per cent earn-

(Testimony of H. G. Hills.)

ings and the dividends on the stock.

Q. They repudiated it, and said that you were not entitled to any statement for the reason that they had no contract with you. Isn't that in substance what they said?

A. They acknowledged that Mr. Greenlees had made the agreement. But, of course, they always had tried to repudiate it since then.

Q. They certainly tried to repudiate it at that time, and did repudiate it, did they not, and refused you any statement of any kind, isn't that true?

A. Yes, they refused us a statement.

Anyhow, I got no statement of dividends or net earnings. I remember asking that those things be forwarded for 1914. I asked Mr. Williams, the secretary, in 1912, here in Great Falls, if he would give me a report of the earnings of the stock and my balance of salary. He said the company won't acknowledge that the [49] earnings were mine. Mr. Williams said that the company would not acknowledge that I was entitled to anything; and that the company would not pay me the balance of that salary nor give me a report on the stock. That was first done in 1912 that I asked for statements of earnings and dividends. This talk was with Mr. Williams. I did not talk with anyone else connected with the company before that time in respect to the earnings. The next time was when we made this visit to Lawrence, Kansas, in 1914.

I got a letter from Williams with a renewal note designated Exhibit 4, but I did not make a demand

(Testimony of H. G. Hills.)

at that time or request a statement as to the net earnings and dividends, because I didn't think the note was paid for at the time. I gave this renewal note (Exhibit 4) a year and one-half later without asking as to whether there had been any net earnings or dividends. I didn't ask anything. I signed, I sent him the note just as he said.

I received a package of papers from Ransom Cooper about January 21st.

(Witness identifies Defendant's Exhibit 6.)

Q. Now, after having seen this Defendant's Exhibit 6, which is a letter that you say you wrote, accompanying the contract, I will again ask you if that is not the paper?

A. I don't know that it is.

Q. You don't recognize it at all?

A. No, sir, when I heard that read down in Kansas, at the depositions taken from the witnesses down there, I was thunderstruck at the contract, and knew that it didn't embody anything like that that we had asked Mr. Cooper to put into the contract.

Q. As far as you know, you have never read anything apparently, as to the terms and conditions of your agreement, and talk with Greenlees was never put in writing at all?

A. I didn't read that.

Q. No, answer the question. [50]

A. Mr. Cooper didn't put into the contract, if that is it, no, sir.

Q. The terms and conditions talked over by you and Greenlees were never put in writing, with the

(Testimony of H. G. Hills.)

exception of that portion that is called Exhibit "A" of the complaint. That is true, isn't it?

A. Yes, sir.

Q. Now, if I understand you, this agreement,—tentative or otherwise, was gotten up in the office of Ransom Cooper here, was it not?

A. Yes, sir.

By Mr. McINTIRE.—I will read this letter, which is marked Exhibit 6, as part of the cross-examination.

**Plaintiff's Exhibit No. 6—Letter, January 20, 1910,
H. G. Hills to J. R. Greenlees.**

PARK HOTEL.

Great Falls, Montana, 1-20, 10.

"Mr. J. R. Greenlees,
Lawrence, Kansas.

Dear Mr. Greenlees:

I have this morning received our agreement from Mr. Cooper, through the mail, and in place of taking it to him for any changes, I wish you would have two copies struck off by a stenographer embodying what would be satisfactory to you and sign one of the copies, sending them both to me and I will sign the other & return it.

Sincerely yours,

H. G. HILLS."

Mr. Greenlees did not comply with this request. I never got back any copies for signature. I received a letter from Mr. Greenlees. I did not receive a copy of the contract.

(Testimony of H. G. Hills.)

I know that there was a stock dividend declared in February, 1913, because I received my payment on some stock that I had. The dividend was not on this 30 shares that I claim, but on other stock that I own in the Company.

Q. You own other stock in this company, do you?

A. Yes, sir.

Q. Where did you get it?

A. I purchased it. [51]

Q. You purchased it in the open market?

A. Yes, sir.

Q. When? A. At different times.

Q. Well, the last purchase made by you was when? A. A couple of years ago.

Q. A couple of years ago? A. Yes, sir.

Q. Oh, a couple of years. Did you own any stock in the company, regardless of this alleged thirty shares, prior to February, 1913? A. Yes, sir.

Q. When did you get that? A. I bought it.

Q. You bought it in the open market, did you, is that true? A. Yes, sir.

There was a stock dividend declared in February, 1913, \$71.39, in the shape of preferred stock for each share of common stock. There had been no dividends of any kind declared prior to February, 1913. They didn't give me any dividends on the stock I bought in the market until we went down in April, 1914. I went to the office and demanded it. They gave me preferred stock at the rate of \$71.39. It was in 1913 that the dividend was declared, but I

(Testimony of H. G. Hills.)

didn't get it until April, 1914. This year, 1916, I received a three (3%) per cent dividend per share on the common stock. I did not receive any in the preceding years, 1915, 1914 and 1913. They earned over *twenty-* twenty-five per cent which went into the surplus fund and increased the value of the stock. I didn't receive anything on the five per cent of the net earnings. I had been receiving only \$120.00 a month from the Continental Oil Company.

Q. And was there any particular reason stated why you should change from one hundred and twenty dollars a month, from one company [52] to one hundred and twenty dollars a month from another company, plus five per cent of its net earnings, plus three thousand dollars of its stock without any payment for it, any particular reason stated for that?

A. It was not plus the stock and plus the earnings, but it was just simply five per cent of the earnings.

By the COURT.—You are asked if you know why you were employed, and given so much of an advance—

A. Because the Mutual Oil Company didn't have a man who knew the selling end of the business, and I had had twenty years' experience, and knew how to build stations, and choose sites, and develop a business, and sell stock on my own responsibility and personalty, so that the company could build stations that didn't cost them one hundred dollars

(Testimony of H. G. Hills.)

a piece, the substations. I did this simply in accordance with the ideas of Mr. Greenlees that the plan was mutual, and that they wanted it to finance itself from the time it started. They wanted the company to finance itself. The idea was we would build a station and with its earnings, we would build the next station, and so on, and so on. I stepped out and sold the stock to build the station, so that they didn't have to put up only about a hundred dollars to a station, and then Mr. Greenlees got enthused with the situation, and kept ordering more stations in.

There was nothing more definite as to how long the arrangement should continue other than Mr. Greenlees told Mr. Cooper it would be as long as he remained in good health and could attend to business. There was nothing said between Greenlees and me as to the duration of the contract or agreement, other than those words, "during your good health or words in substance that." [53]

Redirect Examination by Mr. HURD.

I had several shares of common stock which was stock that I picked up in the market.

Deposition of I. J. Meade, for Plaintiff.

The deposition of I. J. Meade was read in evidence on behalf of the plaintiff, in which the witness testified in substance as follows:

I am in the banking business, being vice-president of the Lawrence National Bank of Lawrence, Kansas, and have held the office since March, 1908. I

(Deposition of I. J. Meade.)

had charge of the discount work and the promissory notes. I have seen a note in the sum of \$3,000.00, dated about January, 1910, in favor of the Mutual Oil Company, signed by one Hills. That note is in the possession of the bank now. It was once in possession of the bank as collateral security to the note of the Mutual Oil Company in the year of 1910. I do not remember how long the Hills' note was to run, but I had possession of it about six months. We loaned the Mutual Oil Company \$4,500 and attached the Hills' note as collateral for \$3,000 of the loan. The bank has not the \$4,500 note of the Mutual Oil Company in its possession at this time. It was signed Mutual Oil Company by J. R. Greenlees, president, and it is my recollection that it was attested by the secretary of the company, but I wouldn't say as to that. The Mutual Oil Company's note ran at least thru two renewals; I would say six months at least. The Hills' note was renewed while being used as collateral in the bank. It was renewed on our suggestion. There was other collateral used to secure the other \$4,500 note of the Mutual Oil Company, but I do not remember what the collateral was. We do not keep any record of strictly collateral notes. The Mutual Oil Company got cash on its \$4,500 note and had use of it during the period covered by the notes.

Cross-examination by Mr. BISHOP.

It is my recollection that Mr. Greenlees did the business with the bank relative to this loan. It is

(Deposition of I. J. Meade.)

my recollection [54] that when the Hills' note became due, I called either Mr. Williams' or Mr. Greenlees' attention to its maturity, and requested its renewal.

Redirect Examination by Mr. WILSON.

I wouldn't say that it was Mr. Williams who attended to the renewal of the Hills' note. It has been some time ago. I know that Mr. Williams knew of the transaction, and it is my recollection that Mr. Williams made the final payment on the note.

Testimony of H. G. Hills, for Plaintiff (Recalled).

H. G. HILLS, plaintiff, recalled for further examination.

Cross-examination by Mr. McINTIRE.

I show you a paper which I will have marked for identification, Mr. Hills, and ask you if you recognize it (paper I refer to is a letter dated Lawrence, Kansas, July 17th, 1911, addressed to you at Great Falls, Montana, and signed with the typewriter Mutual Oil Company). A. Yes, sir.

Q. You stated this morning, Mr. Hills, that you had bought stock on your own account from time to time? A. Yes, sir.

Q. What was the price you paid for that stock?

By Mr. HURD.—To that we object because it is immaterial.

By Mr. McINTIRE.—This is an action for the specific enforcement of a contract for the sale of

(Testimony of H. G. Hills.)

chattel, personal property. Now, if the stock could be bought in the open market, and the allegations of the complaint are that it cannot be bought in the open market, or that there is none for sale, why, it is perfectly competent to show that it can be bought in the market; and by this testimony I think the jurisdiction of the Court is ousted, for this being an action in equity, if the testimony shows that an adequate remedy at law existed, and that rule applies to this case, why the Court is ousted of its jurisdiction. [55]

By the COURT.—Well, if that is the only reason, the objection will be sustained. This is part of your case, and is not proper cross-examination. Mr. Hills mentioned the fact that he had bought stock, said he had bought stock, but I didn't know why this was brought into the case at all.

By Mr. McINTIRE.—The witness testified that he had bought stock in the market.

By the COURT.—Objection will be sustained.

By Mr. McINTIRE.—If your Honor please, I will read in evidence the letter identified by the witness marked Exhibit 7 for defendant.

**Plaintiff's Exhibit No. 7—Letter, July 17, 1911,
from Mutual Oil Company to H. G. Hills.**

“Lawrence, Kans., July 17, 1911.

CHW

Mr. H. G. Hills,
Great Falls, Montana.

Dear Sir:

We overlooked the matter of advising you of the

results of the stockholders' annual meeting which was held July 3rd. The business for the past year in some of our territory was very gratifying and in other parts of the territory it was a great disappointment, which fact was not realized until we closed up our books, which showed up the exact earnings of each station. You will no doubt be somewhat astonished to know that the Montana Territory did a large volume of business during the year, but showed practically no earnings, in which territory we have the largest investment. The net earnings at the close of business May 31, 1911, was 13.3%. If the Montana territory would have made the same earnings as the balance of the territory, the earnings would have been at least 25%. Two-thirds of our capital stock is invested in Montana and we will have to make a better showing, as we cannot expect the rest of the territory with one-third of the investment to carry the burdens of the whole territory.

At the recent meeting of the directors, at which time they went over the entire situation, and it is their opinion that we would have to endeavor to operate the territory more economically, and operate it in such a way so as to reduce the large amount of shrinkage which we had the past year. With the present prevailing low price of the refined oil, have decided it is necessary to make a few cuts in various directions until there was a decided improvement. We regret very much indeed to state that they advised me to inform you that it would be necessary to reduce your salary to \$100 a month

beginning with July 1st, until such a time as the territory was on a paying basis, at which time your salary will be increased according to the net results of the territory. At present, we are doing quite a volume of business in Montana, [56] but the shrinkage and the losses are entirely too much, and it will be necessary for the people in charge of the Montana station to make a special effort to handle the business in such a way as to eliminate or reduce this loss to a minimum. You appreciate the fact it cannot be done in this office and a considerable amount of responsibility in this matter rests upon the force in charge of the territory. The directors were very decided in their opinion and they thought a great deal of the loss of the last year was due to mismanagement. While they are not entirely familiar with all phases of the question, but there is no doubt but what a large amount of the shrinkage could have been overcome if more attention had been given to these details. We regret very much indeed the action we are compelled to take and we trust the station will be handled so that the business will show a profit, and your salary will be increased from time to time according to the net results of the territory.

Yours truly,
MUTUAL OIL COMPANY.

FMD."

DEFENDANT'S CASE.

Testimony of John R. Greenlees, for Defendant.

JOHN R. GREENLEES, called and sworn as a witness on behalf of the defendant, testified in substance as follows:

Direct Examination by Mr. BISHOP.

I have resided at Lawrence, Kansas, for many years. In 1909 I was president of the Mutual Oil Company and continued as president until 1914. At the time I was first elected president, there were seven directors, Junius Underwood, S. D. Bishop, Joseph Fitzpatrick, James E. Russell and John R. Greenlees. In the summer of 1910, I made a trip to Montana and California. I took my family for a trip to the Pacific Coast, and incidentally put in considerable time along the way investigating the condition thruout the country as to the prospect for a market for refined oils, and among other places I stopped at Great Falls. I think some of the directors knew that I was on a trip out West, but the matter was not taken up with the board of directors of the Mutual Oil Company before making the trip. I met Mr. Hills for the first time on that trip and we talked over the general conditions in reference to the marketing of oils in this territory. I was here about two days and around the office where Mr. Hills was working as that was the only concern in Great Falls at that [57] time handling oil, and in the course of our conversation I told him that myself and others were interested in the producing end of the business and werè curious as to the marketing

(Testimony of John R. Greenlees.)

of it and thought some of engaging in it. Mr. Hills said that if we did decide to come into this territory, he would like to be considered as the man to handle the business for us. I told him that nothing was settled as yet, but that I would bear it in mind. On that occasion there was nothing said as to the terms of employment. I did not see Mr. Hills after that time until I came back here in December, 1909. In December I came to this town and purchased a site at Pocatello, Idaho, and Missoula, Montana. I took the title to this property in my own name. Whether I purchased the others in my own name I don't remember, but think I did. I had a talk with Mr. Hills, plaintiff, in December, 1909. I told him that we had about decided to go ahead here in Montana and discussed with him the matter of his taking charge of the business for us.

It is rather difficult to give the exact conversation; but as I recall the matter it was in substance this: He informed me that he was getting a hundred and twenty dollars a month from the Continental Oil Company, and he told me that he had been a great many years in the oil business in this state, and that he thought his services would be very valuable to us, and I confess that I thought there might be something in it myself; and because of his long experience and valuable knowledge of the business he thought he should have an interest in the earnings of this property that he was to take charge of. There was talk also as to the matter of having an interest in the Company. I think I told him that

(Testimony of John R. Greenlees.)

personally I favored the idea of our employees being interested in the company. He stated that he was not in a position to take any stock unless it could be arranged some way that his paper could be carried. After discussing the matter some little time, that memorandum was executed at the time, and was [58] written out by me as embodying what we had talked over and that would be acceptable. The question as to the paying of this note by the earnings was discussed. Of course neither of us could form any accurate idea as to how long it would take, but we thought it would probably take three or four years. We could only estimate that. After we had talked the matter over,—I stated to him that any contract would have to be formally executed by the board, or ratified by the board, formally executed by the president and secretary, and under the company's seal; and he suggested that Mr. Cooper draw up such a contract as we had discussed. So went to Mr. Cooper's office, and Mr. Hills outlined to him the substance of what we had talked over. Mr. Cooper was to draw up a contract covering the matter, and it was to be forwarded to me to present to the company, and secure the signature of the proper officers.

I am not sure what was said with reference to Mr. Hills signing a contract, but my recollection is that he was to draw up a contract and I think he was to execute it and send it down for our consideration. At any rate it was to be submitted to the board of directors. The duration of his employment was

(Testimony of John R. Greenlees.)

discussed somewhat and it was expected that it would last for several years at any rate. We figured that it would take three or four years for these earnings to pay out his note. I believe that was the time he executed the note. Prior to coming here in the month of December, 1909, I had not been directed by the board of directors to make this contract with Mr. Hills. I did not in any way suggest to the board of directors that I should go on and make a contract with Mr. Hills. I couldn't, I didn't know anything about what sort of a proposition Mr. Hills wanted. After returning home, I put that memorandum contract marked Exhibit "A" in a vault there in my office among my private papers. [59] About a month later I got a letter from Mr. Hills enclosing two copies of the suggested contract. Defendant's Exhibit 6 is the letter that accompanied those contracts. Defendant's Exhibit 8 is one of the copies of the contract, which was enclosed with the letter marked Exhibit 6. This contract and letter were placed with the other papers in the vault with the expectation of submitting it to the board at some future meeting. When I returned home I did not submit the contract, Exhibit "A," and the contract, Exhibit 8, to the board of directors of the Mutual Oil Company. I think I mentioned it to Mr. Fitzpatrick and he was very much opposed to anything of that kind being entered into, so the matter was allowed to drift. I never from that time submitted that contract or proposed contract to the board of directors of the

(Testimony of John R. Greenlees.)

Mutual Oil Company for their ratification or approval. About the time this came up I was called away on other business and was away pretty much all the time. I didn't have the opportunity and there was, I believe no regular meeting of the board that I recall until in the June following the annual meeting, but we went ahead trying to get the business started. I did not discuss this contract with any of the individual members of the board outside of Mr. Fitzpatrick as to the advisability of entering into it that I remember of. At the time this Hill's note, marked Exhibit 3, of January 10, 1910, was put up as collateral security for indebtedness of the Mutual Oil Company, I had never told any of the board of directors that the note was to be put up as collateral security. I am not sure that I can tell just how this note was placed as collateral security for this indebtedness. I know this much, that sometime in the spring, I think in April, we were using considerable money in equipping stations. I arranged for a loan of \$5,000 for the Mutual Oil Company at the Lawrence National Bank one time when I was at home, and signed up a note and endorsed it individually. [60] I don't know how this note became attached to the note that I executed, unless the bank may have asked for some collateral to be put up with it, and the man in my office, Mr. Howard, not knowing the circumstances must have taken this note and left it with the bank. It was never endorsed by me nor by the Mutual Oil Company. Mr. Howard was my personal employee

(Testimony of John R. Greenlees.)

and had nothing whatever to do with the affairs of the Mutual Oil Company. The note is not endorsed by the Mutual Oil Company and the only collateral that I ever left with them always had to be endorsed or signed in blank whatever the collateral happened to be. I have no recollection whatever of placing this note in the Lawrence National Bank as collateral security for this indebtedness.

In March or April, 1910, some parties took up the matter of a sale for properties which I owned in Oklahoma, and as that deal got under way, it took up all my time and I was never in Lawrence more than just a day or two between trips. A little later I was obliged to go to Europe four different times.

Mr. Williams became secretary of the Mutual Oil Company as soon as we began to do any business. I never told Mr. Williams of any proposed contract between the Mutual Oil Company and Mr. Hills up to the middle of the year 1911, that I remember of, nor did I ever tell him that this note for \$3,000 signed by Mr. Hills was for stock to be paid in the manner indicated by Exhibit "A." I think that in the summer of 1911, after my return from Europe, Mr. Williams called my attention to the Hills' note and, I believe, at that time brought it back and left it in my office. He said that he had found it in the Lawrence National Bank. Since that time the note and all of the papers, which have been introduced in evidence have been in my possession.

This matter of Mr. Hills was discussed at a meeting of the board of directors, which occurred sometime in the early [61] period of the fall, 1912. I

(Testimony of John R. Greenlees.)

communicated to Mr. Hills the result of the meeting of that board by letter. Defendant's Exhibit 9 is the letter. I don't remember that I had a reply from Mr. Hills.

The matter of the contract was never discussed by me at a regular meeting of the board. The larger percentage of the board of directors had no knowledge whatever of this contract from me.

Defendant's Exhibit 9 offered in evidence is as follows:

Defendant's Exhibit No. 9—Letter, November 25, 1912, J. R. Greenlees to H. G. Hills.

**“MUTUAL OIL COMPANY
LAWRENCE, KANSAS.**

Nov. 25, 1912.

H. G. Hills,

Great Falls, Mont.

Dear Mr. Hills:

Yours of the 21st just at hand. I am unable to say as yet whether I will be able to get out there or not, though I hope to do so. I can probably tell within the next thirty days. I have been kept so very busy with other matters that required personal attention, that I have scarcely had any time to devote to Mutual affairs or to my own personal business. I am getting these matters pretty well out of the way now however. As soon as I can tell about the trip out there, will advise you. As you are aware, the Directors refused to sanction the arrangement that we had partially made, and nothing was done in regard to it.

In regard to the matter of some stock for you, I want to do the best I can to help you out, but am unable to carry the full amount that you desire, and suggest this as something in the nature of a compromise arrangement. I will undertake personally to provide you with ten shares of stock, which would be \$1,000 worth, crediting you with \$700 on same, and you send me your note for \$300 for one year, at 7% payable to me, which I will attach to the certificate, and hold for that time for you. This would give you whatever the earnings were the coming year, to apply on it, less the interest, or, if you prefer instead, I will secure you even shares, fully paid up, for \$700. I am unable to carry the full amount that you wanted, but want to be absolutely fair with you, and I think you will agree that this is doing more than most people would do to help you out. I am sorry that the Board would not consent to the arrangement we contemplated, but under the circumstances, they of course had the right to say, and did so. Kindly let me know if this meets your approval, and on which basis you wish it arranged. This is the best that I can undertake to do, and I make this suggestion merely to show you that I want to do the right thing by you. Please understand I am doing this as a private individual not as an officer of the company, because the company (which had not yet been organized when we talked over this arrangement) [62] when it was organized and directors elected, refused to ratify the arrangement

(Testimony of John R. Greenlees.)

we had figured on. I think this will make it clear to you.

Yours truly,

J. R. GREENLEES.”

I did not go out to see Mr. Hills in pursuance to that letter. I sent Mr. Williams to see him two or three months afterwards, when I found that I couldn't get away myself. I had no knowledge that this note had ever been renewed. The renewal note was dated July 1, 1911. At that time I was in Europe and I didn't return until sometime later in the fall.

Defendant's Exhibit 8 offered and received in evidence is as follows:

**Defendant's Exhibit No. 8—Agreement, Dated —
Day of January, 1910, Between the Mutual Oil
Company and H. G. Hills.**

THIS AGREEMENT, made this — day of January, A. D. 1910, by and between the MUTUAL OIL COMPANY, a corporation, having its principal place of business at Lawrence, Kansas, party of the first part, hereinafter called the Oil Company, and H. G. Hills, of Great Falls, Montana, party of the second part, hereinafter referred to as Hills,

WITNESSETH: Whereas the Oil Company is engaged in the business of buying and selling and distributing thruout the United States oils and oil products, and

Whereas, it contemplates the establishment of a station, depot or distributing point at Great Falls, Montana, for the purpose of selling and distributing

its said products throughout that portion of Montana which is covered by the Great Northern System of railways and all of that portion of Montana tributary to said railways, save and except so much of the State of Montana as lies south of Craig Station on the Montana Central Railway, so-called, and save and except also so much of said State as lies east of Judith Gap on the Billings and Northern Railway, so-called, and,

Whereas, the Oil Company has proposed to said Hills that if he will accept such appointment, it will constitute him its general agent for the conduct of its business in the territory aforesaid, and that the headquarters of such agency shall be at the city of Great Falls, Montana, and the said Hills has accepted such proposal on the terms and conditions herein provided.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES, and of the mutual and dependent arrangements and covenants herein contained,

IT IS AGREED AS FOLLOWS:

That the Oil Company shall forthwith procure and establish a suitable warehouse and an office for the conduct of its business, which warehouse and office shall be situated at the city of Great Falls Montana, and that the said Hills shall take charge thereof and of said business. [63]

That the said Hills shall by the terms hereof be obligated to conduct such business in a good, safe and business-like manner, and to devote his entire time thereto to the end that the said business may be

and become profitable to the parties hereto. That he shall be obligated to keep correct books of account of all transactions and use the best efforts of a reasonably good business man to build up, establish and maintain such business.

That he shall be empowered to establish sub-agencies at such places within said district as he shall deem advisable for the purpose of promoting the sales of said products and shall have charge of promoting the sales of said products and shall have charge and control of such sub-agencies, subject to the approval and directions of said Oil Company.

That the Oil Company shall from time to time furnish said Hills with schedule of prices at which the products are to be sold throughout such territory, and shall keep said Hills advised of such prices, and he shall be obligated to sell at such prices. He shall also be obligated to carry on the business of such agency and territory in accordance with such reasonable rules and regulations as the Oil Company may make for the conduct of such business.

That said Hills shall furnish the Oil Company a good and sufficient Bond in such sum as the Oil Company may deem necessary, conditioned that he will account for and pay over to the Oil Company all moneys which may come into his hands or under his control belonging to the Oil Company, and the Oil Company shall be obligated to pay the premium or premiums on such Bond and said premium or premiums shall be a part of the expense incident to the business of such agency.

The said Hills shall be obligated to deposit the

moneys collected by him in and about said business in some suitable bank in the city of Great Falls, Montana, in the name of the Oil Company as soon as the same shall be collected, and all disbursements which shall be made by him in and about said business shall be made by check on such account signed by him as the Agent of the Oil Company.

The said Hills shall be authorized to collect all moneys that shall become due for the sale of products throughout his district as the same become due. He shall keep correct books of account showing all of his transactions, and when required by the Oil Company, shall make detailed reports showing the condition of the business of such agency.

The Oil Company shall pay the said Hills for his services as such agent the sum of One Hundred and Twenty Dollars per month, payable monthly on the first of each and every month, commencing with the — day of ———, 1910, and such further sum annually as shall be equal to five per cent (5%) of the net profits from the business which shall be transacted within the territory above mentioned.

It is further understood and agreed that the said Hills shall be and remain in the employ of the said Oil Company in the capacity hereinbefore provided as long as the said Hills shall conduct the said business in a careful, prudent, business-like and satisfactory manner. [64]

IN TESTIMONY WHEREOF, the said Oil Company has caused its corporate name to be hereto subscribed and its corporate seal affixed by its president, in that behalf duly authorized, and the party

(Testimony of John R. Greenlees.)

of the second part has set his hand and seal in duplicate the day and year first above written.

MUTUAL OIL COMPANY,

By _____,

President.

_____ (Seal)''

Cross-examination by Mr. FREEMAN.

When I first came to Montana in August, 1909, my stopping here was merely incidental to the trip. I wanted to get all the information I could as to market conditions in the Northwest. I was not then in a position to make any proposition to Mr. Hills. I did not in August, 1909, make that proposition to Mr. Hills for the purpose of having him sever connection with the company for which he was then working to enter the employ of the Mutual Oil Company. He did not tell me upon that occasion that he was not then in a condition to consider my proposition. I did not ask him to consider the proposition or to write me. Exhibit No. 11 is my answer to the letter of Mr. Hills, Exhibit 10.

Exhibit 10 offered and received in evidence is as follows:

Defendant's Exhibit No. 10—Letter, August 27, 1909, H. G. Hills to J. R. Greenlees.

“Gt. Falls, Mont., Aug. 27, 1909.

J. R. Greenlees,

Lawrence, Kan.

Dear Sir:

I am prepared to consider your offer in the manner suggested when you were in Gt. Falls.

(Testimony of John R. Greenlees.)

I would rather not discuss it in detail until you may have decided as to whether or not you will locate here, unless necessary, as my employers may at any time inquire whether an offer has been made me, in which case they would possibly request that I decide at once and I would hardly be in a position to do so.

I trust you will understand my situation in the matter.

Sincerely,

H. G. HILLS.”

Plaintiff's Exhibit 11 offered and received in evidence is as follows: [65]

Plaintiff's Exhibit No. 11—Letter, September 1, 1909, J. R. Greenlees to H. G. Hills.

“AL-LU-WE OIL COMPANY,
Oil Producers Operating in Oklahoma.

J. R. Greenlees, Manager,

Lawrence, Kansas, Sept. 1, 1909.

H. G. Hills,

Gt. Falls, Mont.

Dear Sir:

Yours of the 27th at hand. Will take the matter up with you a little later, probably in person. It will probably be a matter of thirty days or more before we will be likely to see you.

Yours truly,

J. R. GREENLEES.”

In December, 1909, I was here, I think, two days. This memorandum contract signed by me as President of the Mutual Oil Company, was signed upon

(Testimony of John R. Greenlees.)

that occasion. I believe I took the original back with me and put it in the other papers in my vault. I am unable to say how long it remained there, but I think until about the time this suit was filed in September, 1914. As I recollect that was the first time I took it out of the safe. It is my individual safe. The contract which Mr. Hills sent me January, 1910, was put with the other papers. I think this note was with them. My idea in putting these papers in my safe and leaving them there for something over two years, was that at this time the Mutual Oil Company was not engaged in that business; it was chartered that was all. They began doing business sometime in January, 1910, when Mr. Williams was engaged as secretary and manager. At the time I received this contract, the company was getting ready to do business. I was nominated president when the Charter was granted. I was the moving spirit in originating the company. I served as president until 1914. There is no particular reason why I keep the contract and note in my safe without bringing it to the attention of the company. I simply got busy in these matters and the thing was overlooked, I presume. I was busy during the month of January, 1910, in organizing this company and getting started. I was away a large part of the time after [66] January. I knew that Mr. Hills was going along with the idea that he was to get \$120 a month, and this other matter would be acted on by the company. It was not for the purpose of injuring Mr. Hills that his note was not

(Testimony of John R. Greenlees.)

taken before the board of directors. Only a small part of the stock had been subscribed at that time.

Q. What reason did the board of directors ever give that it would be contrary to the interest of the company to allow him, or to issue this amount of stock to him under the circumstances, as you had arranged with him?

A. As I say the board never took any formal action on the matter until sometime in the fall of 1912. The matter came up, I think Mr. Williams was out here, and Mr. Hills had raised the question as to the contract. He came back and investigated it, and a meeting was called, and these old papers were dug up. They were not formally before the meeting, but the board simply informed me that they would have nothing to do with it.

In 1912, at the time I wrote this letter to Mr. Hills, the company was only earning moderate dividends. It is not true that it earned \$750 on every \$1000 of stock. As to my statement in a letter to Mr. Hills that I would provide him with ten shares of stock, crediting him with \$700, I don't know whether you could say that the stock had earned seventy per cent. Most of the earnings came from the purchase of gasoline that I made for the company on which there was a very high advance. It was not from the legitimate earnings of the field, although it belonged to the company. The rapid increase in the value of the stock had nothing to do with my failure to carry out the memorandum agreement with Mr. Hills.

Mr. Bishop, who is here at present as attorney for

(Testimony of John R. Greenlees.)

the company, was one of the directors. We did not have any meeting of the board of directors until June, 1910. [67]

There may have been some record of meetings, but they were not kept as they were from that time on.

During the period from January until June, 1910, there were some purchases of materials. I did considerable of the purchasing. Mr. Williams and myself looked after those things and, if I was there, matters of that kind were referred to me, but not if I was out of town. Mr. Russell and one or two of the others were in or out of the office nearly every day consulting Mr. Williams about matters as they came up.

Between January and June, 1910, I purchased some tanks from the Columbia Steel Tank Company to the amount of \$4,000 or \$5,000. Mr. Williams was in the *employee* of the company February 26, 1910, and in dictating letters frequently used his initials OHW. Generally speaking, in February I was practically the head of the company and all contracts awaited my approval. I don't know that it was so in cases of emergency. It is not true that in February, 1910, I had the absolute management and control of the company. Usually letters of that character were referred to me if I happened to be there; if not, Mr. Russell went over them with Mr. Williams. I presume that he never wrote Mr. Hills anything concerning these thirty shares of stock as to whether he could have them or not until Novem-

(Testimony of John R. Greenlees.)

ber, 1912. During this period, from January to June, 1910, I consulted with Mr. Bishop, the company's attorney, if anything very important came up for action. I don't remember that I consulted with him about this contract. While I considered it an important matter, the general work of opening up the business was a matter of great importance then; that took up all our time. Mr. Hills left the employ of his own company during January, 1910, and this understanding that I had with him had all to do with it, I presume. I didn't say we had offered him a better proposition than he had. We had talked over a better proposition that was to be submitted [68] to my people later on. It was not submitted for the simple fact that we didn't get fully organized until June. I don't recall why it was not submitted then. I don't think I ever submitted it to Mr. Fitzpatrick, but I talked it over with him. I did not start in with Mr. Hills with any purpose of fooling him. When I wrote Mr. Hills in January, 1910, that I had submitted the contract to our attorney, Mr. Bishop, to check up, I think, as a matter of fact, at that time Mr. Bishop was away and there was nothing done about it and the thing was overlooked. That is the only way that I can account for it. I expected to submit that to Mr. Bishop, but found him away.

(Plaintiff offers in evidence Exhibit 12.)

Q. If your board was having no meetings at the time you came out here to Great Falls and didn't have until June, 1910, why did you say to Mr. Hills

(Testimony of John R. Greenlees.)

that the contract would have to be submitted to the directors, the board, for their approval?

A. For the simple fact that both he and I knew that any contract with the company would have to be executed by the officers.

I am not sure that I dictated this agreement to Mr. Hills. We talked the thing over as to what he thought he ought to have, and then this memorandum was drawn up. I don't know why the memorandum agreement did not incorporate the requirement that the contract was to be subject to the approval of the board. I believe his \$3,000 note was executed at the time of the agreement. I think I took the note down to Lawrence, Kansas, and it was afterwards put up as collateral for a note of the Mutual Oil Company that I had executed. I believe the first Hills' note was for eighteen months. We estimated it would be three or four years before it would pay up on the dividends. I have absolutely no personal knowledge of the transfer of Mr. Hills' note for \$3,000 out of my safe to the Lawrence National Bank. The situation was [69] simply this: Mr. Howard was in my office and he looked after my personal affairs that came up. Not knowing about the facts in the case, I presume that they asked him if there was some collateral to go with that note and he found this up there and took it up to them. That is the only way I can account for it. I do not think the company had much collateral at that time. It is not true that he financed all these substations by the subscription of stock. In my

(Testimony of John R. Greenlees.)

letters to Hills, I suggested to him that he try to get ranchers to buy stock. He only sold about twenty or twenty-two shares. I did not think it would be perfectly proper to take this \$3,000 note and put it up as collateral until the matter had been sanctioned by the board.

Redirect Examination by Mr. BISHOP.

I don't think I ever submitted that contract to you. I intended to but I think when I went to submit it to you you were out of town. The thing was put away and I was away so much that it was overlooked again. At the meeting held in November, 1912, I believe you asked to see those contracts and I said they were in my safe. It is my recollection that Mr. Hills sold twenty or twenty-two shares of stock at \$100 a share.

Testimony of O. H. Williams, for Defendant.

O. H. WILLIAMS, called and sworn on behalf of the defendant, testified as follows: I am Secretary and General Manager of the Mutual Oil Company residing at Kansas City, Missouri. I have been continuously in the employ of the company since January 15, 1910. I first became acquainted with Mr. Hills when I made by first trip to Montana some time the latter part of December, 1910. Mr. Hills was then District Manager of our company. I was there three or four days and went over the details of the business with Mr. Hills. I do not recall Mr. Hills saying anything to me at that time in reference to a note or contract, or note given to the Mutual Oil Company. The first recollection I have

(Testimony of O. H. Williams.)

of the note was when Mr. Meade, Vice President of the Lawrence National [70] Bank, called my attention to the Hills note attached to the Mutual Oil Company's note as collateral, and being past due requested me to get a renewal. I have no recollection of discussing this note or its consideration with anybody prior to that time. As Mr. Meade had called my attention to the note, I acted on his suggestion and sent to Mr. Hills for a new note. Exhibit 4 was the note that Mr. Hills returned. I did not discuss this matter with any of the board of directors. I don't remember seeing the unexecuted contract until this action was brought. I was going thru Mr. Greenlees' files, or in his vault one time, and found this memorandum contract. We had lost the deed to the Missoula property, and I was going thru his records trying to find that deed, and that was when I first saw and read this memorandum contract referred to here as Exhibit "A," and dated December, 1909. That was either the latter part of 1911, or the early part of 1912. My recollection is that Mr. Greenlees was not at home at the time I discovered the contract, and I discussed it with Mr. Russell, the vice-president, who instructed me to deliver those papers to Mr. Greenlees, which I did. I got the note from the bank and delivered it to Mr. Greenlees. I have no recollection of the whereabouts of the first note as it had been renewed. I only remember the second note and delivered it to Mr. Greenlees on Mr. Russell's instructions. I was here in August, 1912, and saw Mr. Hills, which is the first

(Testimony of O. H. Williams.)

recollection I have of Mr. Hills discussing the contract or the note with anyone.

Q. You may state what was the conversation which you had with Mr. Hills upon that occasion?

A. The matter was brought up, I recollect, by Mr. Hills with reference to his contract, and so on, at which time I advised him that the Mutual Oil Company as a board of directors did not consider they had any contract with him, because the contract had never been ratified, and if he had any contract, or any agreement, [71] it was with Mr. Greenlees personally, as the Mutual Oil Company never recognized or approved the contract.

Q. What, if anything, did he say at that time?

A. Well, I cannot repeat the exact conversation, but it was simply along the line that it was a contract and he would insist upon it, or something of that nature.

Q. Upon your return, what did you do with reference to calling a meeting of the board of directors?

A. I then discussed the matter with Mr. Russell, and we called the board of directors together, and after our regular routine business was done then Mr. Russell brought up this contract, which was the first time it was ever presented to the board of directors. It was done informally after the business of the company had been transacted.

Q. Mr. Greenlees was present upon that occasion?

A. He was.

Q. That was the first time?

(Testimony of O. H. Williams.)

A. That it was ever brought up at a director's meeting.

Q. Mr. Greenlees, as I understood you to say, had possession of these notes from the time they were delivered to him? A. He had.

Q. And the memorandum contract?

A. Yes, sir.

Mr. Hills' salary was reduced during the year 1911. The voucher checks were sent for the salary and were cashed, and the cancelled vouchers returned. Then afterward his salary was raised. He was manager during all of the time that he was in the employ of the company until practically March, 1913, when Mr. Hult became manager. Mr. Hills still remained in the employ of the company as a clerk until he was discharged in the latter part of August, 1914. After the meeting of 1912, Mr. Greenlees employed me to see Mr. Hills and settle with him on his behalf. [72] That was sometime in February, 1913. I was coming up here and Mr. Greenlees gave me ten shares of common stock, which was his personal stock, and asked me to endeavor to make some kind of a settlement with Mr. Hills personally. I told Mr. Hills when I attempted to settle with him that I was merely representing Mr. Greenlees in a personal matter. I informed Mr. Hills that the Mutual Oil Company repudiated,—had never ratified the contract, and if he had any grievance, it was against Mr. Greenlees and the company considered it a personal matter between Mr. Greenlees and Mr. Hills, and that I was

(Testimony of O. H. Williams.)

willing to do anything within reason to make an amicable settlement. I then told him that Mr. Greenlees had given him this ten shares of stock and he refused it.

Mr. Hills sold for us in Montana approximately twenty-two shares of stock at \$100. The present market value of the Mutual Oil Company's stock is \$162. That is the book value.

Q. Can stock be bought for that price? In considerable quantities?

A. Well, there is still some treasury stock.

Q. Isn't it true that Mr. Greenlees is offering his stock for that much?

A. Mr. Greenlees is offering his stock, and there is another party offering his stock for \$160.

Cross-examination by Mr. HURD.

There are more than thirty shares of common stock in the treasury at the present time with the book value of \$162. There is no common stock on the market offered for \$100 per share that I know of, nor do I know of any that can be purchased for the sum of \$100.

I was appointed secretary of the company on January 15, 1910. Mr. Holt and Mr. Lou Jones took the matter up with me and told me about the Mutual Oil Company. At that time I was not personally acquainted with Mr. Greenlees. They were stockholders [73] at that time and asked me to call upon Mr. Greenlees and he offered me this position which I accepted and then bought ten shares of stock. It was not a part of our arrangement at

(Testimony of O. H. Williams.)

that time that I should become a stockholder. The board of directors advised me that I had been elected secretary and ever since that time I have had charge of the books. I knew that the company had been incorporated by J. R. Greenlees, Willis K. Folks, Junius Underwood, Hugh Blair, and S. D. Bishop about January 15, 1909, and they put me in as secretary in January, 1910. At that time they had a president, but they did not have an office. Their business was done in Mr. Greenlees' office. After I became secretary and the business was started, I rented the office myself and took certain data and memoranda from Mr. Greenlees' office. I don't know of anything having been done in a business way before the office was rented for the company. I found the memoranda concerning the Missoula property in Mr. Greenlees' files and also took over from his office copies of letters and letter files, and so forth. The records of business done by the company which I took from Greenlees' office were a few letters and a check book. I don't know that they had any treasurer. I paid out money for the Mutual Oil Company and in everything that I did was in representing the company. The letters that I wrote Hills was on behalf of the company. I consulted Mr. Greenlees on affairs, but I was active manager. There was nobody so far as I know who was active manager until I assumed the position of secretary. I do not know of various contracts made by Mr. Greenlees prior to the time I became secretary. As to the Columbia Tank contract I figured largely in

(Testimony of O. H. Williams.)

that myself. I wrote the letter, Exhibit "F," attached to that deposition. I knew at that time that the Oil Company had entered into a contract with the Tank Company for materials. That was a little over five weeks after I had assumed the position [74] as secretary. At that time the oil company was entering into contracts, but they were not necessarily referred to Mr. Greenlees for final approval. Exhibit "F" refers to a contract with the tank company, signed by Mr. Greenlees and myself as president and secretary. We had other contracts prior to June, 1910, for materials and other matters. This tank contract is the only one that I can recollect having been signed by Mr. Greenlees. We entered into contracts generally in the transaction of business purchasing tanks and merchandise in the open market; simply direct purchases, not contracts in the sense of a formal written instrument. These letters that went to the different concerns were signed practically by myself after I took charge, mostly signed on the typewriter. When the name Mutual Oil Company was signed on the typewriter, it was intended to have it represent the company. It is my recollection that there was no meeting of the board of directors prior to June, 1910. I went ahead and did business as it appeared to me proper. After I took charge Mr. Greenlees did very little. Mr. Russell was more active. Before I took charge, I had no knowledge of how it was done. Whatever business there was, so far as the data shows, was done by Mr. Greenlees for the company. At the

(Testimony of O. H. Williams.)

June meeting, 1910, the directors present were Mr. Blair, Mr. Bishop, Mr. Underwood and Mr. Greenlees. The stockholders were there *to*. It was a stockholders' meeting and that time we elected directors. They were elected to succeed the incorporators who evidently were acting as a board up to that time. Mr. Russell took an active part up to June, 1910. He was not an incorporator, simply a stockholder. I deferred to Mr. Russell's wishes. We endeavored to handle the business to the best advantage of the stockholders. I cannot give any real reason for their not having a directors' meeting until June, 1910, except that they were in and out of the office and we knew what was going on. It is not a fact that the operations of the company [75] during that time were merely an informal matter handled by Mr. Greenlees and myself. When the data belonging to the Mutual Oil Company was brought from Greenlees' office, I don't know whether I went after it or it was delivered to my office. There was nothing even to me but a few letters and a check book. Mr. Greenlees did not make his office in my office thereafter. It was along the latter part of 1911 or early part of 1912 that in rumaging through his vault I discovered these exhibits representing the contract. At that time I did not take charge of it for the oil company. Mr. Greenlees never discussed his arrangement in detail with me. He said that Mr. Hills was employed out here as manager of the company. After I took charge in January the correspondence came to my office. I opened that cor-

(Testimony of O. H. Williams.)

respondence but never saw the note marked Exhibit 3 in this case coming through the mail to the Mutual Oil Company. The first recollection I have of that note was when it was found in the Lawrence National Bank. I did not keep a record file at that time of notes and bills payable to the company. We didn't open any books until four or five months afterwards. During that time we didn't have any record of the corporation transactions. It was probably sometime in April before we opened any books. Prior to that there was just a memorandum made, and later on entries were kept from that. We had so many things to do, all the stations to build, equipment to get and all the forms to get out. We incurred debts to the tank company and other concerns, but they were not paid for, perhaps, 50 or 60 days after the stuff was purchased. I do not know of any contracts being disputed by the company through lack of authority on the part of Mr. Greenlees. No such question was raised with the tank company. It was not necessary. I practically handled that transaction. The money to pay our bills came from the stockholders, I went ahead on my own initiative and paid it out. There was no specific authority from the board of [76] directors. About the only reference of business matters to any of them was to Mr. Russell. The incorporators were considered to be acting as a board of directors from whom I was supposed to receive authority to act as manager and secretary. Prior to June 1910, Mr. Fulks had not authorized me to do

(Testimony of O. H. Williams.)

any business. Junius Underwood was in and out of the office like other members and had his say in the matter. Also Hugh Blair and Mr. Bishop, Mr. Greenlees, Mr. Underwood, Mr. Blair, Mr. Fulks and Mr. Bishop would drop into the office now and then and kept fairly well in touch with what was happening. They were the five persons who assumed to act as a board of directors. Prior to the June meeting of 1910, Mr. Russell was merely a stockholder. He was elected director at the June, 1910 meeting. I think Mr. Fitzpatrick was made a director at the meeting of June, 1910. In June, 1910, the new directors were Greenlees, Bishop, Russell, Fitzpatrick, Blair and I think T. H. Chalkey. They did not hold regular directors' meetings after June. There were very few meetings for the first two or three years. The officers of the company practically transacted all of its business, except the president, he had very little to do with it. He was away most of the time. If I was not talking about this particular case, I would not say that Greenlees had authority to direct what would be done. He was president of the company and I deferred to his wishes so far as his office would go. Matters coming up when Mr. Greenlees was away were not always submitted to him for his advice. He was not necessarily looked to as the final resort. I knew that his office was a superior office to mine, but did not always regard his judgment as binding upon me. I put my judgment up against his in some things. In one instance we had a clash and I went ahead and transacted the

(Testimony of O. H. Williams.)

business. I did not look to Greenlees as my superior officer in all cases, except that one. I do not now recall any specific instance where I did not observe the [77] directions of the superior officer of the company.

I prepared the note (Exhibit 4, for the plaintiff) which was transmitted to Mr. Hills through the mails. It is in my handwriting and for the sum of \$3,000. The other note for \$3,000, dated January 10, 1910, Exhibit 3, I did not have before me at that time, but knew the contents of it. I cannot tell why it was that the interest was not included in the renewal note. I cannot explain why the renewal note for \$3,000 is the same as the original note. I don't recollect asking Mr. Hills to pay interest and evidently no attention was paid to the interest. It was not because I knew that the Hills' note was to be paid out of the earnings and dividends. I cannot explain why the interest was not called for or not included in the face of the note. I evidently knew that Mr. Hills gave the note in payment of the stock. I didn't know the nature of the contract until 1911 or 1912. I evidently learned of this note being given in payment for stock sometime the latter part of 1911. In January, 1910, I did not know that this note was given in payment for stock. I understood that Mr. Hills, at the time he was employed, was to be a stockholder. I do not know as I knew at all times that this \$3,000 note was outstanding in favor of the company. I evidently knew that it had been given in payment for stock. Up to that time the

(Testimony of O. H. Williams.)

note was not in my office; Mr. Greenlees had it. I evidently knew that it was a Mutual Oil Company note. I knew that the company was getting money from the bank with which to transact business, and when Mr. Meade of the Lawrence National Bank called my attention to the fact that the Hills' note was unpaid, I evidently knew that the note had been turned over to the company for stock. I did not have the stock issued to Hills as I was not instructed to issue any stock. I had authority, but the note was not delivered to me and I was not told to issue stock for that note. In some cases we may have received part cash and part note [78] in payment for stock. I have no explanation to offer at all about the interest. I never saw Exhibit "A" until some time the latter part of 1911 or early part of 1912. I first found it in Mr. Greenlees' papers, but did not tell the Board of Directors immediately about it. I discussed the matter with Mr. Russell. I was permitted by Mr. Greenlees to examine his vault for papers. I don't recollect whether he was there at the time or in the city. He made some long trips and was away a great deal of the time. I never discussed the matter of finding the contract among his papers with Mr. Greenlees at all. I disclosed the information to Mr. Russell as I thought he was entitled to it, because of the unusual nature of the contract.

I had never been in the oil business before and got my experience from the Mutual Oil Company people.

(Testimony of O. H. Williams.)

I did not know what the usual work was in Montana, or what conditions were to contend with. I knew that we had to compete with the Continental Oil Company, and the Pure Oil Company came in afterwards. I said I thought it was an unusual contract in that it gave something without something in return. I did not think that, a man starting a concern in a business like Mr. Hills did here in Montana, would be entitled to compensation to that extent. This view was not due to the fact that the contract had been repudiated by our people. In 1911 the net earnings of the company in the Hills' territory would be approximately \$2,500. In the second fiscal year which would end March 1, 1912, the net earnings were approximately \$5,500, and in the next fiscal year to March 1, 1913, the net earnings were approximately \$11,000. The second year after that the territory showed no increase. The profitable deal that we made in gasoline was sometime in 1911 or 1912. We bought the gasoline in the early part of the year and sold it in August and September. The earnings for the next year ending June was evidently about 25%. The Hills' contract [79] was not presented to the board until later in 1912. The company had earned by that time approximately \$70,00 per share. The dividends were declared in February, 1913. I was up here to see Mr. Hills in February, 1913. At that time the dividends of the company had been declared. I did not mention the fact to Mr. Hills that such dividends had been declared, that I have any recollection of.

(Testimony of O. H. Williams.)

I told Mr. Hills that Mr. Greenlees had sent me in a personal capacity for the purposes of closing up the transaction. I think it was at the Rainbow Hotel when I offered him the 10 shares of stock. Mr. Cooper and some other friend were present. I advised Mr. Hills that the board had refused to ratify the contract, and that Mr. Greenlees was willing to settle the matter, whatever it was, personally. I cannot recollect whether I mentioned to Mr. Hills that the 30 shares of stock had at that time earned dividends to the extent of \$2,100. I don't know what Mr. Greenlees' reason was for being willing to credit Mr. Hills \$1,000 for the stock, as he stated in his letter. I had no instructions that I recollect with reference to paying Hills \$700. Mr. Greenlees asked me to make some settlement with Mr. Hills and gave me the 10 shares of stock, which he told me to use. I was to make him a present of the 10 shares of stock, if he would settle the matter with Mr. Greenlees. The matter didn't get very far. He said he wouldn't consider it and the matter was dropped there. Greenlees told me to settle the difficulty for the 10 shares. If Hills had been done any injustice by the contract being repudiated by the Mutual Oil Company, he was willing, as a personal matter, to shoulder the burden and give Mr. Hills the stock for what injuries that might have been done him. I did not tell Mr. Hills that I was to donate the 10 shares in settlement of the balance due on his salary, five per cent earnings and the contract for stock. I did not at that time offer him stock for

(Testimony of O. H. Williams.)

either of these notes. The 10 shares of stock were [80] not to be in settlement of the five per cent feature and the \$20.00 a month for six months. Mr. Greenlees had personally written to Mr. Hills assuming the personal responsibility. The 30 shares of stock were considered out of the proposition. The note was not a Mutual Oil Company note; it was in Mr. Greenlees possession. I got it from the bank and turned it over to Mr. Greenlees. I did not consider that I was giving away company property. The company had not given anything for it.

Practically all the correspondence handled out of the office was dictated by me. At the time I discovered the contract with reference to the five per cent of the net earnings, I assumed that Mr. Hills was working under that agreement. Mr. Hills worked along after I had knowledge of that contract for a considerable period of time. I was not instrumental in preventing the company from carrying out that contract with reference to the five per cent of the net earnings. I do not know as I protested against it. I talked with Mr. Russell about it being such an unusual contract. I don't know as I told him that the company ought not to stand for it. That it was up to the board. I wasn't taking the initiative in that. This matter of the Hills' contract was brought up in one meeting in 1912. It is not a fact that the Hills' contract would always be discussed by the directors after adjourning the directors' meeting. We had a full board of seven directors at that time. They did not take a vote on

(Testimony of O. H. Williams.)

it. They simply said they would not be bound by it. There never was any formal action of the board of directors on the contract. I am positive that there is no record concerning any action that any director ever took on the matter. I cannot recall writing any letters to Hills about this contract. There may have been, but I have no recollection of it. I never notified Mr. Hills about the matter except personally when I was out here. I told him that I knew about the contract and that the board of directors would not [81] ratify it. The members of the board had expressed their opinion individually and said they would not ratify it. The only authority I had to tell him that they would not ratify the contract was their action in that meeting. The contract was never discussed but once at the directors' meetings, and there was no action taken then except simply discussing it. The reason of the company for repudiating the contract was not because the business turned out better than expected, but because they considered that they didn't have any right to do it. The matter always talked of was whether the directors had a right to give away the earnings of the company. When I told Hills in my letter that as soon as the net earnings would justify it we would increase his salary, I meant that we had always been willing to increase the salaries of our employees as long as the business would justify it. It was my idea in July, that Hills' compensation should be determined according to the net profits. I did not raise

(Testimony of O. H. Williams.)

his salary in 1912 or 1913 when the business showed profits. In the letter I wrote him I meant that I would raise his salary from time to time as the business in the territory grew and the profits would justify it. It was made with good intentions. I was not merely jollyng the fellow along. It is the only contract that the company ever repudiated as far as I know. I do not know whether Mr. Hills was notified of the declaration of the dividends or that he first learned of the accrual of the dividends when he went down to Kansas, 1914. He was credited with the amount of his dividends, but it wasn't an even amount. It didn't equal \$100, which was the par value of the preferred stock.

Redirect Examination by Mr. BISHOP.

The Hills contract was discussed by each one of the directors at the regular meetings of the directors of the Mutual Oil Company in 1912. It was discussed before adjournment of the meeting. Except Mr. Greenlees, not one of the directors was [82] in favor of ratifying it. Mr. Greenlees took part in the discussion. The board of directors instructed him to take it up with Mr. Hills and inform him that the board would not ratify the contract.

Deposition of Junius Underwood, for Defendant.

The deposition of JUNIUS UNDERWOOD, taken July 29, 1915, was read in evidence on behalf of the defendant, in which the witness testified in substance as follows:

I have resided in Lawrence, Kansas, forty-seven years, being in the clothing, feed and grain business.

(Deposition of Junius Underwood.)

I was one of the charter members of the Mutual Oil Company when it was organized in 1909. I have been a stockholder and director ever since. I have been vice-president since 1914. J. R. Greenlees was president of the corporation at the time of its inception. He continued to be president until June 30, 1914. He was also a director. The company first commenced to transact business some time in January, 1910, at the time Mr. Williams was appointed secretary. Prior to his appointment, the corporation had not done any business as a corporation. The board of directors met as a board about once a month later. I don't think that I have ever missed a meeting of the board of directors since its organization. I have met the plaintiff, Mr. Hills. It was when he and his attorney were here from Montana something like a year and one-half ago. The first time that I ever saw Exhibit "A" was when I saw it yesterday in your office. That contract was never authorized by the Oil Company nor was Mr. Greenlees ever directed to execute it. It was never presented to the board of directors. It was never before the board or discussed by the board. Mr. Greenlees at no time as an individual or as president of the company ever presented this contract to the board of directors. I first learned that such a contract was in existence in the fall of 1912, after we moved into our new offices in the Beery [83] Building. I got my information from Mr. Greenlees, but I never saw the contract until

(Deposition of Junius Underwood.)

yesterday, July 28, 1915. When Mr. Hills was here in Lawrence with his attorney, it was at the annual stockholders' meeting. After we were doing business up in the Montana territory, Mr. Greenlees told us that he had employed Mr. Hills. I knew that his salary was \$120.00 per month. The board of directors never authorized Mr. Greenlees in any way to sell company stock and to take dividends upon the stock in payment, or to sell stock and take payment of the same in promissory notes. He wasn't authorized to sell any stock on that basis. I first saw the Hills' note for \$3,000, Exhibits "B" and "C," yesterday, July 28, 1915, in your office. Exhibits "A," "B," and "C" were never presented to the board of directors of the Mutual Oil Company. The board of directors never accepted Exhibits "B" and "C" in payment of any stock belonging to the company. I think in the fall of 1912, I had heard of these notes. To my knowledge Exhibits "A," "B" and "C" have never been in the possession of the Mutual Oil Company. They were in Mr. Greenlees' possession. He never presented them to the board of directors as being payment of stock sold to Mr. Hills. The first time I ever learned that Mr. Hills claimed to own any stock in this company and to pay for it by Exhibits "B" and "C" was when he and his attorney came before the annual meeting of the board of directors about one and one-half years ago. The first time I ever saw Exhibit "D" was yesterday, the 28th of July, 1915. That con-

(Deposition of Junius Underwood.)

tract was never presented to the board of directors by Mr. Greenlees nor was it ever in possession of the Mutual Oil Company. Mr. Greenlees had possession of it; I know it wasn't in possession of the Mutual Oil Company. In the fall of 1912, I learned from Mr. Greenlees that there was some such contract as Exhibit "D." Mr. Greenlees was never authorized in any way by the Mutual Oil Company to execute the contract [84] as shown by Exhibit "D." The matter was never up before the board.

Cross-examination by Mr. J. B. WILSON.

The Mutual Oil Company is an Arizona corporation with the charter granted in March, 1909. I was elected a director of the company at the time of its organization, I suppose. I was a charter member. I don't think we ever had a meeting of the subscribers of the stock prior to the issuing of the charter by the State of Arizona. Our first meeting, I think, was June 6, 1910. I was elected at the meeting of June 6, 1910. I was one of the charter members, and I suppose all charter members were the directors at the time. There wasn't an annual meeting until June 6, 1910. I don't think we, who were the original subscribers and charter members, had a meeting of the stockholders prior to the issuance of the charter. Mr. Greenlees was chosen president of the concern, June 6, 1910. I don't know who the officers were when the company was chartered, other than those who were elected June 6, 1910. My impression is that the charter

(Deposition of Junius Underwood.)

members were re-elected at the meeting on June 6, 1910. We had no official meeting before that time at least. I don't remember of the choice of any officers of this concern prior to June, 1910. I remember that Mr. Greenlees was the promoter of the proposition and Mr. Williams was the active secretary and manager of the company, but he wasn't regularly elected until June, 1910. I think I was one of the charter directors. There wasn't any official election of directors or officers until the meeting of June 6, 1910. We had subscribed stock and I guess Mr. Greenlees told me that he wanted me as a director of the company, and as I didn't object they put me in. I think Mr. Greenlees solicited the first subscription of the stock of this company. After March, 1909, during that season Mr. Greenlees went west and looked over the ground and took up some locations for sites. He went to Montana. [85] We talked over the purpose of his visit and he was to select sites for oil stations. It was the purpose of his trip to do all things necessary for the opening up of the State for the purpose of selling our products. I do not remember having any conversation with the other directors, Mr. Blair or any of the directors within two or three months after Mr. Greenlees returned, as to what he was up there for. I never had any communication from Mr. Greenlees while he was in Montana. I did not know that he was there in August, 1909, for the purpose of transacting business for the Mutual Oil Company. After he got back he told me about

(Deposition of Junius Underwood.)

selecting some sites in Montana. Before he went he discussed the subject of promotion, and that he was going west to locate sites for oil stations, but he did not mention Montana. It might have been California or some other point. I did not know that after his return from Montana that he carried on a large amount of correspondence for Mr. Hills, concerning this contract. I did not know that long prior to June, 1910, Mr. Greenlees, acting on behalf of the company, ordered a large number of tanks and other equipment for the Montana territory. I don't know who had charge of the money for the Mutual Oil Company from March, 1909, to June, 1910. Mr. Williams took charge in June, 1910. Prior to that, I suppose, Mr. Greenlees had charge of the funds, but I don't know; I kept no track of these funds paid into the corporation. I know in a general way that Mr. Williams after he became secretary in January, 1910, had charge of the receipts and disbursements and general supervision of the company. I never inquired what he was doing for the company at that time. The meeting of June 6, 1910, was for the election of directors. Mr. Williams told me to come. He was then secretary. I could not tell you how he had been elected secretary as I was not at the meeting. I only know that he was elected [86] secretary and general manager on June 6th. I don't know that Mr. Greenlees kept on attending to business for the company after Mr. Williams was elected. It was my idea that Mr. Williams had charge. He might

(Deposition of Junius Underwood.)

have conferred with Mr. Greenlees in regard to certain things, but I don't know of my own knowledge. I saw Mr. Greenlees from time to time throughout the year of 1910, and probably discussed with him in a general way the affairs of the company. He told me that he had employed a man by the name of Hills to manage the territory in Montana and that he was getting \$120.00 a month. I knew nothing about any other contract. I knew that Mr. Hills was hired on a salary to look after the business in Montana. It was all right with me as a director. Mr. Greenlees and Mr. Williams were steering things. Mr. Greenlees was elected president at the June meeting, 1910. I do not think he was given any other official position. It was not understood that he was performing the duties of general manager. The secretary, Mr. Williams, was authorized to act as general manager. Up to June, 1910, Mr. Greenlees had been selling stock of the company. Prior to June, 1910, there was no specifications as to how stock should be sold. They all paid cash for it. I paid cash for mine. I suppose the rest did. I don't know of any action taken by the board of directors directing how stock should be sold prior to June, 1910. I am not familiar with the by-laws of the company. I am a director now and have been since the organization of the company and have been at every directors' meeting. I don't recall the date of the meeting at which the by-laws were passed. I don't think there was any official meeting prior to June, 1910.

(Deposition of Junius Underwood.)

I never knew anything about those notes, Exhibits "B" and "C," prior to March, 1913. I think Mr. Russell told me about them. It was when we found that a note was up in the Lawrence National Bank as collateral. I do not know when it was placed [87] there. It was placed there by Mr. Greenlees, but I don't know whether it was on his own account or the company's account. I know when Mr. Russell found out about it, he told Mr. Williams to return it to Mr. Greenlees. I don't suppose that Mr. Russell would be ordering Mr. Greenlees to take down notes on his own personal account. It was in the fall of 1912, when I first knew about it. The matter was not discussed at the meeting of the board of directors. I did not know that this \$3,000 note, Exhibit "B," was the original note and had been renewed by the new note, Exhibit "C."

The matter of Hills' employment as manager of the Montana District was never discussed at a directors meeting, as to the terms of his employment. We knew that he had been appointed by Mr. Greenlees, but supposed he was hired on a salary. Along about June, 1912, we had meetings every thirty days. The question of Mr. Hills' contract and claim for thirty shares of stock and five per cent of the net earnings in addition to his salary was not discussed at a general meeting of the board of directors of May or June, 1912. I attended every meeting of the company. We heard about this contract thru Mr. Greenlees in the fall of 1912, thru

(Deposition of Junius Underwood.)

this note proposition coming up. It was not discussed at a regular board meeting. I learned of it individually from Mr. Greenlees, and I think I talked it over with some of the directors. It was not brought up or discussed at a meeting of the board of directors at all. I think all of the stockholders, other than Mr. Hills, paid cash for their stock. The money was paid when the stock was issued to them. I don't know that Mr. Hills sold stock for the company in the Montana District. I knew that a few shares were sold at various stations in the Montana District, but I do not know who sold it. The company did not repudiate any of the business transacted by Mr. Greenlees in the Montana territory that came before the [88] board of directors that I know anything about.

Redirect Examination by Mr. BISHOP.

All business matters came before the board of directors. The contracts and sites were approved by the board. Mr. Greenlees took the Great Falls site in his own name. After our June meeting in 1910, he conveyed the site by deed to the company. That was brought before the board of directors. All business has come before the board from the time the board of directors first met as a board. The charter provides that every business transaction has to be ratified by the board of directors. When Mr. Greenlees returned after purchasing the sites in Montana, he did not communicate with me in any way concerning any contract matter by Mr.

(Deposition of Junius Underwood.)

Hills. The first time I ascertained that there was such a contract was in the fall of 1912. This was also the first time I learned of the sale of any stock for notes. Mr. Russell, then vice-president of the company and acting president, told me about it in 1913. I think we had some conversation with some of the directors about the contract purported to have been made by Mr. Greenlees to Mr. Hills, but it never came before the board. In talking with the directors informally in regard to that contract, I did not find any of them in favor of it. When Mr. Greenlees first told me about it, I told him I would not favor it.

Recross-examination by Mr. WILSON.

As a director of the company up to June, 1910, I knew that Mr. Greenlees had charge of the business of equipping the stations in Montana, and that he was the promoter of the company and had come up there in interest of the company. The board of directors never took any action as a board at all on any phase of Mr. Greenlees' agreement with Mr. Hills. I never heard of this proposed contract until the fall or winter of 1912 thru any source at all.

[89]

Deposition of Hugh Blair, for Defendant.

The deposition of HUGH BLAIR, taken July 29, 1915, a witness on behalf of the defendant, was read in evidence. The witness testified in effect as follows:

I am an attorney at law and have lived at Law-

(Deposition of Hugh Blair.)

rence, Kansas, 31 years. I was one of the charter members of the Mutual Oil Company, and have been connected with that company as a director and stockholder since its organization. I was one of the first members of the board of directors. There was no business performed by the company that I know of outside of the selling of stock by Mr. Greenlees until June, 1910. It was just informal business. There was no formal organization of the company until June, 1910, nor any meetings of the board of directors prior to that time. Mr. Greenlees did sometimes come in and discuss the business of the company in my office and sometimes in his office. He would tell us how the company was getting along. I don't remember any routine business until Mr. Williams was made secretary and manager. The business of the company commenced in an official way when the regular board of directors was elected in June, 1910. On that occasion Mr. Greenlees presented certain matters to the board with reference to the purchase of sites and the action of himself and Mr. Williams in purchasing equipment which was discussed and confirmed.

I first became acquainted with Mr. Hills when I met him and his attorney at the annual meeting in 1914. Exhibit "A" was never presented to the directors as a board. I had heard the contract talked about. I think Mr. Williams mentioned it informally at one of our meetings. I don't know who had possession of it. The company was never in possession of this contract to my knowledge. It

(Deposition of Hugh Blair.)

was never in the possession of the company by authority of the board of directors. The board never authorized Mr. Greenlees to enter into a contract of that character. [90] The board of directors never authorized Mr. Greenlees to sell stock and receive payment therefor from the dividends accruing from the stock; nor did they ever authorize stock to be sold by taking in payment therefor the promissory notes of individuals. The stock was sold for cash at par without any discount or commission to anyone. Mr. Greenlees never brought before the board of directors the question of selling stock on time to anyone and taking in payment therefor promissory notes to run until the dividends paid for the stock.

The first time I ever saw the contract, Exhibit "A," was in your office yesterday. Yesterday I saw Exhibits "B" and "C" for the first time. These exhibits were never presented to the board of directors for approval or rejection. I remember these notes being discussed informally at one of our meetings, but the notes were not presented. The matter of the contract and notes was first brought up by either Mr. Russell or Mr. Williams. Mr. Greenlees never discussed it at a board meeting of my knowledge. None of the Exhibits "A," "B," or "C" were ever exhibited at a meeting of the board or the terms discussed. Exhibit "D" which I saw for the first time yesterday was never presented to the board of directors. I learned about it at the same time I heard about the notes. Mr. Greenlees never presented either of the Exhibits "A," "B,"

(Deposition of Hugh Blair.)

“C” or “D” to the board of directors for approval or rejection. I never discussed these various documents or proposed contract with Mr. Hills before the board. The board of directors at no time authorized or directed Exhibits “B” and “C” to be placed as collateral security for any indebtedness of the company, nor were they so placed with the knowledge or consent of the board of directors. The contracts and notes were never in the possession of the company to my knowledge. Mr. Williams might have had them, but I have no knowledge of them ever being exhibited at a meeting of the board of directors. [91]

I was one of the incorporators of the company and was one of the first board of directors and have continued to be a director ever since. So far as I know, I have attended every meeting of the board. I have no recollection of missing a meeting. I also took an active part in selling stock. I sold about \$10,000 worth of the stock at par, and for cash only. I never offered to take paper from anybody and nobody ever offered to buy stock on time. I do not know of the officers or directors having ever been authorized to sell stock on time or taking payment in promissory notes for the stock to be paid by dividends upon the stock so sold. The board of directors had never given authority to any person to dispose of stock on such terms.

Cross-examination by Mr. WILSON.

I cannot recall any meeting of the board of incorporators or the board of directors at any time

(Deposition of Hugh Blair.)

in the year 1909. It is my opinion that there was no regularly called formal meeting. We directors did discuss the affairs of the company from time to time and talked about it when we happened to meet each other. I took but little interest and had but little knowledge of the company before Mr. Williams took up the affairs.

Mr. Greenlees did not tell me he was going to Montana before he went, but after he had been there I met him one day and he told me that he had been to Montana, to open up the territory there. He told me he was going to have a station at Great Falls and one at Missoula. I knew right after January, 1910, that the Montana territory had been opened up and stations placed in the Great Falls District. I knew that these things were going on, but before the June meeting I did not know to what extent they had been accomplished.

Mr. Williams opened his office in January, 1910. He was nominally the secretary, but not regularly elected until June, 1910. Mr. Greenlees, I think, mentioned Williams and [92] asked the rest of us what we thought about it, and we sanctioned the hiring of Mr. Williams. Mr. Greenlees consulted us about it. It was my understanding that Mr. Williams was to take charge of the detailed business management of the company in January, and his position was to be ratified in June when the board met. Up to that time I had no knowledge of the contract between Mr. Greenlees and Mr. Hills. When he returned from Montana he told me he had

(Deposition of Hugh Blair.)

made some arrangements with Mr. Hills. I thought it was simply a matter of salary. To the best of my recollection I first learned about the execution of the notes, Exhibits, "B" and "C," at a directors' meeting after we had really ended our formal business of the board. Mr. Williams brought the matter up. I never knew that the note had been placed as collateral for the Mutual Oil Company with the Lawrence National Bank. I think Mr. Williams when he found the note was placed in the bank asked us about it. I don't remember Mr. Williams or anyone else ever saying anything about the renewal of this note in July, 1911. Mr. Williams was the secretary and manager at that time. He was the most active man in the company.

I remember the matter of the company intending to reduce Mr. Hills' salary from \$120 to \$100 a month coming up in the directors' meeting. It is my recollection that they authorized the manager to notify Mr. Hills of the reduction. I do not recall that Mr. Williams ever told the directors anything about Mr. Hills' reply to the company on the matter of reduction of salary. The fact is that this is the first I ever heard of it. I knew there was dissatisfaction. I know we discussed the question of his not earning the salary he was getting and we thought it ought to be cut down, and Mr. Williams gave his reason for it. I was under the impression that it had been cut down. The management of the business to July, 1910, was left very largely to Mr. Greenlees and Mr. Williams. Up [93] to Jan-

(Deposition of Hugh Blair.)

uary, 1910, I don't think that Mr. Greenlees took any important steps without consulting us about it. I first heard about the notes at the meeting in 1912.

Q. Now, has the board of directors of the Mutual Oil Company ever repudiated any of the things done by Mr. Greenlees while he was acting as manager of the company?

A. We had heard of this contract with Mr. Hills and asked him about it, and he told us about it, and we absolutely refused to ratify it so he never asked the board to ratify it.

Q. Did you pass a formal resolution refusing to ratify it?

A. No, sir; we discouraged Mr. Greenlees so much when he mentioned it to us informally that the matter was never brought up before the board.

Q. Now, in June, 1910, at this first meeting of the board of directors, did Mr. Greenlees make a report of the business he had transacted for the company prior to that time?

A. He made a verbal report, he did not make a written report to my knowledge.

Q. Did the company at that time or later ever take up any action in the way of repudiating or ratifying in the things that Mr. Greenlees had done prior to that?

A. I have no recollection of any action being taken on any of his matters.

Q. The company accepted the profits on the business he started in Montana?

(Deposition of Hugh Blair.)

A. We accepted the bad debts that were made there, too.

I knew that Mr. Hills was acting as resident agent of the company, and I supposed that was as far as it went just as Mr. Russell was in Fremont, Nebraska, and Mr. Coleman in Superior, Nebraska, the board certainly never gave him more authority than those men. He did not have as many little stations. I don't think there are as many stations in Montana as in Nebraska. [94]

I have no recollection of a bond furnished by Mr. Hills being presented by anyone to the board of directors. We may have taken up the question of a surety. I presume I knew about Mr. Hills furnishing a bond of \$5,000 at the time. I have no recollection of the exact time or occasion. I presumed we authorized it and paid for it. I have no recollection of any formal meeting of the stockholders or directors from March, 1909, to June, 1910. During that period we transacted the business by personal conferences and in an informal manner.

Redirect Examination by Mr. BISHOP.

Our company requires a bond of every employee who handles money or merchandise. Up to the time Mr. Williams was appointed, the oil company did no business to amount to anything. It never had an office before that except in Mr. Greenlees private office. The meetings up to June, 1910, were purely informal affairs.

Deposition of J. B. Russell, for Defendant.

The deposition of J. B. RUSSELL, a witness on behalf of the defendant, taken July 29th, 1915, was read in evidence. [95]

The witness testified in effect as follows:

I became a stockholder in November or December, 1909. I was not a stockholder when the company was organized. At the first annual meeting in June, 1910, I was elected a director and vice-president. I am still a director. I held the position as vice-president until June, 1913, and then became president. In the absence of Mr. Greenlees, as vice-president I frequently exercised the position of president.

Exhibit "A" was never presented to the board of directors for approval, ratification or rejection, to my knowledge. I first saw Exhibit "A" some time during the year 1912. Mr. Williams dug it up in the papers and showed it to me. The notes, Exhibits "B" and "C," were never brought up before the board of directors for approval or rejection. Mr. Williams told me that he had found that note Exhibit "B" in the bank and had renewed it. I requested Mr. Williams to withdraw that note and return it to Mr. Greenlees. I think that was in July, 1911. That was when he mentioned it to me and told me that he had renewed it. The renewal of that note was not brought up before the board of directors to my knowledge. I know of no authorization by the directors for putting this note up as security for any note of the company. The fact that it had been put

(Deposition of J. B. Russell.)

up as collateral security was never put before the board. I do not know what became of this Exhibit "B" after I told Mr. Williams to withdraw it and return it to Mr. Greenlees. I supposed he had done as I told him. No authority was ever given to any member of the board or any person to sell stock of the Mutual Oil Company upon credit or to receive in payment for the same dividends accruing from the stock thus sold. Mr. Greenlees was never given authority to sell stock of the company and receive as payment for same the dividends from the stock thus sold or receive in payment promissory notes. [96] No stock has ever been sold that way to my knowledge. I never knew until yesterday of the existence of Exhibit "D." I did not know of the existence of such a document prior to that time only the little memorandum I mentioned before. I never knew that subsequent to the date of Exhibit "A." Mr. Hills had forwarded Exhibit "D" to the Mutual Oil Company for execution. I heard some talk that he had sent a contract to Mr. Greenlees. Mr. Greenlees did not present Exhibit "D" to the members of the board for ratification or rejection. While acting as vice-president the competency of Mr. Hills was discussed before the board of directors. The objections urged against him were that he was not careful enough about his credits and often went contrary to instructions.

Cross-examination by Mr. WILSON.

There was no meeting of the board of directors that I know of called until June, 1910. I never say any

(Deposition of J. B. Russell.)

record of any meeting before then. I know that long prior to June, 1910, Mr. Greenlees and Mr. Williams were carrying on a vast amount of business for the company in Montana and Nebraska. I was in rather close touch with the company from the fall of 1909. I knew a number of stations had been installed around Great Falls prior to June, 1910; and that the business had been done by Mr. Greenlees and Mr. Williams. Mr. Williams didn't do any of this work until June, 1910. Prior to that it was Mr. Greenlees but he always consulted the rest of us. I was not on the board but I was in close touch with him. The Montana work was not done entirely by Mr. Greenlees. I was consulted about the stuff that was shipped up there and I think the rest of the stockholders were too. After Mr. Greenlees had been to Montana to open up this territory, he told me what had been done there. As I remember [97] it the matter was referred to the stockholders and we all consulted about it individually as we met around. We had no formal meeting. I sold stock as much before I was director as later. Mr. Greenlees was the promoter of the company. I suppose he was placed on the application for charter as President of the company. I remained president until June, 1914. Prior to my election the company did not have any vice-president. It was after Mr. Williams had told me he found the note in the Lawrence National Bank and renewed it that I first learned of these exhibits "B" and "C." He told me that he had found a \$3,000 note at the Lawrence National

(Deposition of J. B. Russell.)

Bank and that when the note became due he was requested to have it renewed and he had it renewed. I think the note was given for eighteen months and run out July, 1911. It was soon after that he called my attention to it. Mr. Greenlees was away and I requested him to take that note and return it to Mr. Greenlees. I was acting as president at that time and as president gave those orders, and he told me he carried them out. I took the authority whether I had it or not. The only time the matter ever came up before the board of directors was at the time I saw the memorandum. The matter was mentioned at one of the meetings either at the beginning or at the close of the meeting. I suggested that the Mutual Oil Company had nothing to do with that matter. I said that it was up to Mr. Greenlees and Mr. Greenlees admitted that it was. We took no action on it as a board, but discussed it in July, 1912, about a year after the note was renewed. That was the only time it was ever mentioned in a directors' meeting. I talked personally about it with some of the directors. I talked about it with Mr. Williams. I was in the office with him at the time. I don't think I ever saw any letter from Mr. Hills in respect to the reduction of salary. I know that he had been notified that his salary had been lowered \$20 a month, but I don't recall that I ever saw a letter in answer to that. I cannot remember whether [98] I ever saw the particular bond that Mr. Hills gave. Every employee that handles money or stock

(Testimony of O. H. Williams.)

is compelled to give a bond. I know that every bond has an application. I don't know whether I saw that particular one.

**Testimony of O. H. Williams, for Defendant
(Recalled).**

Redirect Examination by Mr. HURD.

O. H. WILLIAMS, recalled for further cross-examination, testified as follows:

I was in charge of the office on the 20th of March, 1910, and subsequent dates. I presume I received a copy of an application for a bond in a surety company for Mr. Hills. I subsequently forwarded that application of the company and paid the premium. All employees were placed under bonds. The application was filled out by Mr. Hills. It was mailed to me with the answer he had made to the bonding company. I evidently signed a declaration on behalf of the Mutual Oil Company letting it go forward with the application. When the application went thru the office, question 19, asking do you owe your employer anything and if so how much and on what account and when due, was answered "renewal note for \$3,000," and the answer to question 23 as to the description and value of your personal property was answered "30 shares of Mutual Oil Company Stock," and so forth. I evidently had knowledge of the facts stated in the application at the time of its date. I cannot recall at all at this time what I filled in there. I saw this blank at the time it was filled out and all the declarations contained in it.

DEFENDANT RESTS.

**Testimony of A. M. Embrey, for Plaintiff (in
Rebuttal).**

A. M. EMBREY, called as a witness on behalf of the plaintiff in rebuttal, testified in substance as follows:

Direct Examination by Mr. HURD.

I am acquainted with the plaintiff, H. G. Hills, and likewise with O. H. Williams. I recall having seen Mr. Williams and Mr. Hills at the Rainbow Hotel in the summer of 1912. I also recall [99] the fact that one Cooper who was in the employ of the Mutual Oil Company was likewise present. We were all in the same room at the Rainbow Hotel. The meeting was in the latter part of the summer. Mr. Hills and I entered the room at the same time and we left the room at the same time. Mr. Hills and Mr. Williams had a conversation in the room with reference to some oil stock. Mr. Williams said he was representing the Mutual Oil Company. There was nothing said at that time by him as to the fact that he was representing Mr. Greenlees. There was nothing said in that conversation about 10 shares of stock delivered to Mr. Greenlees.

CASE CLOSED. [100]

The foregoing is presented as a statement of the evidence taken at the trial of said cause.

S. D. BISHOP,

J.W. CHURCH, and

FLETCHER MADDOX,

Solicitors for Defendant.

Service of above statement of the evidence is

acknowledged and copy received this 31st day of May, 1917, and we hereby consent that the same be settled as a statement of the evidence.

FREEMAN & THELEN and
NORRIS & HURD,

Solicitors for Plaintiff.

The foregoing statement of the evidence contains all of the testimony, oral and documentary introduced at the trial of said cause and is approved this 9th day of June, 1917.

BOURQUIN,
United States District Judge for the District of Montana.

Filed June 9, 1917. Geo. W. Sproule, Clerk. By
C. R. Garlow, Deputy. [101]

Thereafter, on March 20, 1917, Petition for Appeal was duly filed herein, in the words and figures following, to wit:

[Title of Court and Cause.]

Petition for Appeal.

To the Honorable the Judges of the District Court of the United States, Ninth Circuit, District of Montana:

The above-named defendant, a corporation, feeling itself aggrieved by the decree made and entered in this cause on the 20th day of March, 1917, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons and upon the grounds specified in the assignment of errors, which is filed herewith, and said defendant

prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, and your petitioner further prays that the proper order touching the security to be required of it to perfect its said appeal be made, and your petitioner shall ever pray, etc.

I. W. CHURCH,
FLETCHER MADDOX and
S. D. BISHOP,
Solicitors for Defendant.

Filed Mar. 20, 1917. Geo. W. Sproule, Clerk.
[102]

Thereafter, on March 20, 1917, assignment of errors was duly filed herein, in the words and figures following, to wit: [103]

[Title of Court and Cause.]

Assignments of Error.

Comes now the above-named defendant on this 20 day of March, 1917, and says: That the decree entered in the above cause on the 17th day of March, 1917, is erroneous and unjust to the defendant, and assigns and specifies the following errors committed by the Court in the rendition and entry thereof:

1. The Court erred in holding and deciding that the plaintiff's amended bill of complaint stated a

cause of action for equitable relief.

2. The Court erred in holding and deciding that the plaintiff was entitled to a specific performance of the contract set forth in his amended bill of complaint.

3. The Court erred in holding and deciding upon the full hearing of the case that the plaintiff was entitled to the equitable relief of specific performance upon the evidence taken and considered upon the trial of said cause.

4. The Court erred in holding and deciding that the contract set out in plaintiff's bill was a completed agreement and not a mere preliminary negotiation.

5. The Court erred in holding and deciding that the contract, or preliminary memorandum was intended by the parties to take immediate effect.

6. The Court erred in holding and deciding that the reduction of the contract in question to writing and its approval by the defendant's directors, had been waived. [104]

7. The Court erred in holding and deciding that the reduction of the contract in question to writing was not a condition precedent to its validity.

8. The Court erred in holding and deciding that the reduction of the contract in question to writing as a condition precedent to its mutuality had been waived by the defendant.

9. The Court erred in holding and deciding that the contract set out in plaintiff's bill had been ratified by the defendant's board of directors by acquiescence with knowledge.

10. The Court erred in holding and deciding that

the contract set out in plaintiff's bill had been ratified by the defendant's board of directors by silence or by receiving the benefits with knowledge.

11. The Court erred in holding and deciding that the defendant was estopped to repudiate the alleged contract after knowledge thereof by its board of directors.

12. The Court erred in holding and deciding that the contract set out in plaintiff's bill was not *ultra vires*.

13. The Court erred in deciding the present action in favor of the plaintiff and against the defendant, and in ordering and entering judgment herein in favor of the plaintiff and against the defendant.

14. The Court erred in refusing to order and have entered judgment herein in favor of the defendant and against the plaintiff.

WHEREFORE, the said defendant prays that said decree be reversed and the said District Court be instructed and ordered to enter such decree as the Circuit Court of Appeals of the United States for the Ninth Circuit shall deem meet and proper on the record.

I. W. CHURCH,
FLETCHER MADDOX and
S. D. BISHOP,
Solicitors for Defendant.

Filed March 20, 1917. Geo. W. Sproule, Clerk.

Thereafter, on March 20, 1917, Order Allowing Appeal and Fixing Bond was duly entered herein, as follows, to wit:

[Title of Court and Cause.]

Order Allowing Appeal and Fixing Bond.

At a stated term, to wit, the October Term, A. D. 1916, of the District Court of the United States in and for the District of Montana, held at the courtroom in the city of Great Falls, State of Montana, on the 20th day of March, 1917; present, the Honorable GEO. M. BOURQUIN, District Judge.

On reading and filing the petition of the defendant herein, for an order allowing appeal, and the assignment of errors herein made and signed by the said defendant, on motion of Messrs. I. W. Church, S. D. Bishop and Fletcher Maddox, counsel for said defendant and appellant, Messrs. Norris & Hurd and Freeman & Thelen, counsel for respondent, being present.

It is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at the said city of San Francisco, and the State of California, from the final decree heretofore made, entered and filed herein on the 17th day of March, 1917, be and the same is hereby allowed; and that a transcript of the record and all proceedings had in said cause be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the defendant deposit with the clerk of this court a certificate or certifi-

cates of stock in due form, signed and attested in the usual manner, for thirty (30) shares of the common stock of the capital stock of said defendant, Mutual Oil Company, issued to and in favor of the plaintiff, H. G. Hills; and

It is further ordered that the amount of the security [106] on appeal herein to be furnished by the said defendant, be and the same is hereby fixed at the sum of Three Hundred Dollars (\$300) and that upon the making and filing with the clerk of this court of a good and sufficient bond in said sum by the said defendant, all further proceedings be superseded and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals, and until the further order of this court.

BOURQUIN,
Judge.

Filed and entered March 20, 1917. Geo. W. Sproule, Clerk. [107]

Thereafter, on March 20, 1917, bond on appeal was duly filed herein as follows, to wit:

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Mutual Oil Company, a corporation, as principal, and F. A. Bronson and Grace A. Bronson, as sureties, are held and firmly bound unto the above-named H. G. Hills in the sum of Three Hundred Dollars for the payment of which, well and truly to be made, we bind ourselves, jointly and severally,

and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 19th day of March, 1917.

Whereas, the above-named defendant has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered in the above-entitled cause in the District Court of the United States, Ninth Circuit, District of Montana, on the 17th day of March, 1917.

And whereas the above-named defendant has deposited with the clerk of this court a certificate for thirty (30) shares of the common stock of the said defendant to be held by said clerk, pending the final decision of said appeal.

Now, therefore, the condition of this obligation is such that if the above-named defendant, Mutual Oil Company, a corporation, shall prosecute said appeal to effect and shall answer all damages and costs that may be awarded against said defendant corporation if it fails to make good its plea, then the above obligation is to be void; otherwise to remain in full force and virtue.

MUTUAL OIL COMPANY.

J. E. HULT, Mgr.

F. A. BRONSON.

GRACE J. BRONSON. [108]

State of Montana,
County of Cascade—ss.

F. A. Bronson and Grace J. Bronson, the sureties whose names are subscribed to the foregoing undertaking, being severally duly sworn each for himself

says: that he is a resident and freeholder within the county of Cascade, State of Montana, and is worth the sum specified in the foregoing undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

F. A. BRONSON.

GRACE J. BRONSON.

Subscribed and sworn to before me this 19th day of March, 1917.

[Seal]

T. F. MYERS,

Notary Public for the State of Montana, Residing at
Great Falls.

My commission expires Feb. 1, 1918.

The foregoing undertaking on appeal is hereby approved.

Great Falls, Montana, March 20, 1917.

BOURQUIN,

Judge.

Filed March 20, 1917. Geo. W. Sproule, Clerk.

[109]

That on June 9, 1917, a citation was duly issued herein, which said original citation is hereto annexed and is in the words and figures following, to wit: [110]

*In the District Court of the United States, Ninth
Circuit, District of Montana.*

H. G. HILLS,

Plaintiff,

vs.

MUTUAL OIL COMPANY, a Corporation,

Defendant.

Citation.

United States of America,

District of Montana,—ss.

The President of the United States to H. G. Hills,
and to Messrs. Freeman & Thelen and Norris &
Hurd, His Solicitors:

You are herewith cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within 30 days from the date hereof, pursuant to an appeal filed in the office of the clerk of the District Court of the United States, Ninth Circuit, in and for the District of Montana, wherein H. G. Hills is plaintiff and respondent, and the Mutual Oil Company, a corporation, is defendant and appellant, to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable GEO. M. BOURQUIN,
Judge of the District Court of the United States for

the District of [111] Montana, this 9 day of June,
A. D. 1917.

GEO. M. BOURQUIN,
Judge of the District Court of the United States, for
the District of Montana.

Personal service of the foregoing citation upon us
and receipt of a copy thereof this 11 day of June,
1917, is hereby acknowledged.

NORRIS & HURD,
FREEMAN & THELEN,
Solicitors for Plaintiff. [112]

[Endorsed]: No. 43. In the District Court of the
United States, Ninth Circuit, District of Montana.
H. G. Hills, Plaintiff, vs. Mutual Oil Company, a
Corporation, Defendant. Citation. Filed June
12th, 1917. Geo. W. Sproule, Clerk. By C. R. Gar-
low, Deputy. [113]

That on the 7th day of June, 1917, praecipe for
transcript was duly filed herein, in the words and
figures following, to wit:

[Title of Court and Cause.]

Praecipe for Transcript on Appeal.

To the Clerk of Said Court:

You will please incorporate into the transcript on
appeal in the above-entitled action the following por-
tions of the record in said cause, to wit:

1. Plaintiff's amended complaint.
2. Defendant's answer to the amended complaint.
3. Plaintiff's reply to defendant's answer.
4. The statement of the evidence as agreed to by
counsel and settled by the Judge.

5. The opinion of the Court rendered in said cause.
6. The final decree rendered and entered therein.
7. The petition on appeal.
8. The order allowing the appeal.
9. The assignment of errors.
10. The bond on appeal.
11. The citation on appeal and proof of service.
12. The clerk's certificate to transcript of record and the names and addresses of the solicitors of record.

S. D. BISHOP,
I. W. CHURCH and
FLETCHER MADDOX,
Solicitors for Defendant.

Great Falls, Mont., June 6, 1917.

Service upon us this 6th day of June, 1917, of a copy of the foregoing praecipe indicating portions of the record to be incorporated in the transcript on appeal is hereby acknowledged.

FREEMAN & THELEN,
NORRIS & HURD,
Solicitors for Plaintiff.

Filed June 7, 1917. Geo. W. Sproule, Clerk.
[114]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United

States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 115 pages, numbered consecutively from 1 to 115, inclusive, is a full, true, and correct transcript of the pleadings, orders, opinion and decree, and all other proceedings had in said cause required to be incorporated in the transcript on appeal therein by appellant's praecipe therefor, including a copy of said praecipe, and of the whole thereof, as appears from the original records and files of said court in my custody as such clerk; and I further certify that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-seven and 15/100 Dollars, (\$47.15) and have been paid by the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 12th day of June, 1917.

[Seal]

GEO. W. SPROULE,
Clerk. [115]

[Endorsed]: No. 3010. United States Circuit Court of Appeals for the Ninth Circuit. Mutual Oil Company, a Corporation, Appellant, vs. H. G. Hills, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed June 15, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
²
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the PHOENIX HARDWARE
COMPANY, a Corporation, Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Appellants,

vs.

CHARLES B. CHRISTY, as Trustee of the Estate
of PHOENIX HARDWARE COMPANY,
a Corporation, Bankrupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Arizona.

Filed

JUL 3 - 1917

F. D. Monckton,

Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the PHOENIX HARDWARE
COMPANY, a Corporation, Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Appellants,

vs.

CHARLES B. CHRISTY, as Trustee of the Estate
of PHOENIX HARDWARE COMPANY,
a Corporation, Bankrupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*In the District Court of the United States for the
District of Arizona.*

In the Matter of PHOENIX HARDWARE COM-
PANY, Bankrupt.

**Petition for an Order Directing the Trustee to Make
an Assessment and Call upon the Unpaid Sub-
scriptions to the Stock of the Said Bankrupt for
the Purpose of Paying Its Debts.**

To FRED A. LARSON, Referee in Bankruptcy,
Phoenix, Arizona.

Your petitioner, Charles B. Christy, Trustee of the
Estate of Phoenix Hardware Company, a corpora-
tion, bankrupt, respectfully shows:

I.

That the said Phoenix Hardware Company, bank-
rupt, was duly incorporated under *and virtue* of
the laws of the Territory, now State, of Arizona,
during the month of March, 1907, with a capital
stock of Fifty Thousand (\$50,000) Dollars, divided
into Five Hundred (500) shares of the par value of
One Hundred (\$100) Dollars each, and its principal
place of transacting business was fixed by its articles
of incorporation at the City of Phoenix, Maricopa
County, Arizona, and hence forward and until the
time hereinafter mentioned conducted and carried
on a general hardware and implement business in
said City of Phoenix, Arizona.

II.

That by the terms of the articles of incorporation
under which said corporation, bankrupt, was in-
corporated, it is provided that all subscriptions for

the capital stock of said corporation shall be paid into the said corporation within thirty (30) days from the time such stock is subscribed for. [1*]

III.

That by the terms of said articles of incorporation it is provided that the affairs of the said corporation shall be conducted by a board of directors, consisting of three (3) stockholders, who shall be elected annually by the stockholders from among their number at the annual election thereof, and until the first annual meeting of said stockholders, J. B. Long, J. W. Long and M. West were designated and appointed the Board of Directors of said corporation.

IV.

That said articles of incorporation further provided that the officers of said corporation shall be a President, Secretary and Treasurer, and at a meeting of the said Board of Directors held on the 19th day of March, 1907, the said J. B. Long was elected President of the said corporation and the said J. W. Long was elected its Secretary and Treasurer, and at said meeting one W. J. Kingsbury was appointed the legal agent of said corporation.

V.

That since the incorporation of said corporation as hereinbefore set forth no annual or special stockholders' meeting whatever has ever been held by the stockholders of *said corporation and no annual or special stockholders of said corporation and no annual or special stockholders' meeting whatever has ever been called by the officers or stockholders of*

said corporation and that the said J. B. Long, J. W. Long and M. West ever since the incorporation of said corporation have been and now are the duly appointed, qualified and acting Board of Directors of said corporation.

VI.

That since the said 19th day of March, 1907, the said Board of Directors have held no meeting whatever, and [2] ever since the said 19th day of March, 1907, the officers so elected as aforesaid on the said last mentioned date have been and now are the duly elected, qualified and acting officers of said corporation.

VII.

That notwithstanding the articles of incorporation of said corporation authorized and empowered the Board of Directors of said corporation to establish all needful by-laws, rules and regulations for the management of its affairs and officers, the said Board of Directors has wholly failed to make or establish any by-laws, rules or regulations whatever for the management of its affairs and officers, or otherwise.

VIII.

That on the 19th day of March, 1907, the said M. West subscribed for Two Hundred and Fifty (250) shares of the capital stock of said corporation and paid to said corporation thereon the sum of Five Thousand (\$5,000) Dollars and no more, and that said M. West has not since said last mentioned date, nor at any time or at all paid or caused to be paid to said corporation any further sum or sums whatever for and on account of said stock so subscribed for as

aforesaid, and that said corporation made, issued and delivered to said M. West certificate for said Two Hundred and Fifty (250) shares of its said capital stock as for full paid shares.

That on the 19th day of March, 1907, the said J. B. Long subscribed for One Hundred and Thirty (130) shares of the capital stock of said corporation and paid to said corporation thereon the sum of Twenty-six Hundred (\$2600) Dollars and no more, and that the said J. B. Long has not since said last mentioned date *not* at any time or at all [3] paid or caused to be paid to said corporation any further sum or sums whatever for and on account of said stock so subscribed for as aforesaid, and that said corporation made, issued and delivered to said J. B. Long its certificate for said One Hundred and Thirty (130) shares of its said capital stock as full paid shares.

That on the 19th day of March, 1907, the said J. W. Long subscribed for Eighty (80) shares of the capital stock of said corporation and paid to said corporation thereon the sum of Sixteen Hundred (\$1600) Dollars and no more, and that the said J. W. Long has not since said last mentioned date nor at any time or at all paid or caused to be paid to said corporation any further sum or sums whatever for and on account of said stock so subscribed for as aforesaid and that said corporation made, issued and delivered to said J. W. Long its certificate for said Eighty (80) shares of its said *capital* stock as for full paid shares.

That on the 19th day of March, 1907, one Margaret

M. Long subscribed for Forth (40) shares of the *Capital* stock of said corporation and paid to said corporation thereon the sum of Eight Hundred (\$800) Dollars and no more, and that the said Margaret M. Long has not since said last mentioned date nor at any time or at all paid or caused to be paid to said corporation any further sum or sums whatever for and on account of said stock so subscribed for as aforesaid and that said corporation made, issued and delivered to said Margaret M. Long its certificate for said Forty (40) shares of the said *capital* stock as for full-paid shares.

IX.

That by agreement made at the date of the several issues of stock as hereinbefore set forth the amounts paid thereon by each of said stock purchasers were credited to [4] said subscribers and the balance unpaid of the face value thereof was credited by discount and the stock account between the said bankrupt corporation and said subscribers was balanced by such discount.

X.

That the officers, managers and agents of said corporation, bankrupt, represented to the public that all its capital stock had been subscribed for and had been or would be paid in full, and relying on such representations the public, and especially the creditors of said corporation, extended credit to said corporation in the amounts and to the extent as hereinafter set forth.

XI.

That thereafter, to wit, on the 24th day of Octo-

ber, 1914, the said Phoenix Hardware Company was by a decree of the above-named court duly adjudged a bankrupt, and that on the 16th day of November, 1914, your petitioner, Charles B. Christy, was duly elected and appointed Trustee of the Estate of said Phoenix Hardware Company, bankrupt, and on the 17th day of November, 1914, your petitioner accepted said trust and qualified as such trustee on November 20, 1914, and hence forward has been and still is the duly appointed, qualified and acting trustee of said estate.

XII.

That at the date of said adjudication in bankruptcy the affairs of said corporation were in a very embarrassed and complicated condition and much time has been necessarily consumed and considerable expense incurred in the proper administration of the affairs of said bankrupt estate, and that all of the property and assets of said bankrupt on hand at the date of adjudication in bankruptcy and all property [5] and assets of said bankrupt that has come into the hands of your petitioner since said adjudication has been disposed of as rapidly as seemed conducive to the interests of all concerned.

XIII.

That the total amount of claims filed and allowed against the said estate amount to the sum of Fifty-eight Hundred and Thirty-five (\$5,835) Dollars, and the statutory time for filing claims against said estate has long since expired, and your petitioner has now in his hands a balance applicable to the payment of these claims, amounting to the sum of Three

Hundred and Seventy-seven and 94/100 (\$377.94) Dollars, said balance being also subject to the payment of costs, disbursements, commissions and counsel fees.

XIV.

That the only remaining assets of said estate are certain book accounts, which are not collectable, and the unpaid subscriptions to the stock of said bankrupt, as hereinbefore set forth, and which is yet due and unpaid on the said stock held and owned by said stockholders, which amounts to the sum of *Fourth* Thousand (\$40,000.00) Dollars, and that the amount of the liabilities of the said bankrupt estate over and above the assets now in the hands of your petitioner is Five Thousand Four Hundred and Fifty-seven and 06/100 (\$5,457.06) Dollars.

XV.

Your petitioner further avers that an assessment of thirty-four (34%) per cent upon the par value of each share of stock in said company if credited with the amount paid by each stockholder heretofore would equalize the burden upon the said stockholders and also bring into the hands of your petitioner a sufficient amount to pay the debts of [6] the said bankrupt estate and the costs and necessary expenses incurred in the prosecution of this action.

XVI.

Your petitioner further avers, that he is informed and believes and so alleges the fact to be that certain of the subscribers to the capital stock of said corporation, to wit, the said J. B. Long, the said J. W. Long and the said Margaret M. Long, are and

each of them is insolvent and unable to respond in damages or to an order of this Court requiring all of the stockholders of said corporation to pay over to your petitioner a sufficient amount to pay the creditors thereof.

WHEREFORE, your petitioner prays, that an order be made by this Honorable Court directing the said stockholders hereinbefore named to be and appear before this Honorable Court on a day and place to be fixed by this Court to show cause, if any they have, why an order of this Court should not be made requiring your petitioner to make an assessment and call upon all the stock of said corporation for the purpose of paying the debts of said corporation, bankrupt, and the expense of prosecuting this action as hereinbefore set forth.

2d. That upon such hearing this Honorable Court make an order directing your petitioner to make an assessment and call upon the stock of said corporation, bankrupt, of thirty-four (34%) per cent upon the par value of each share of the stock of said corporation, bankrupt, and that each stockholder be credited with the amount heretofore paid by him thereon and that the sum so assessed shall be paid to your petitioner, Trustee of said bankrupt estate, on or before a day certain to be fixed by this Honorable Court, and in [7] default of payment of said sum that he be directed to sue for and collect the same.

3d. That the agreement between the said corporation and its stockholders to the effect that they, the said stockholders, would not be required to make

any further payment on their said stock be set aside as in fraud of creditors.

4th. That the said stockholders J. B. Long, J. W. Long and Margaret M. Long are and each of them is insolvent and unable to respond to an order of this Court requiring the stockholders of said corporation to pay over to your petitioner a sufficient amount of money to pay the debts of said corporation, and that said stockholder M. West be required to pay over to your petitioner a sufficient amount to pay the debts of said corporation.

CHARLES B. CHRISTY,
Trustee.

J. C. FOREST,
Attorney for Trustee.

State of Arizona,
County of Maricopa,—ss.

Charles B. Christy, being duly sworn, deposes and says that he is the petitioner above named, that he has read the above and foregoing petition, knows the contents thereof and that the matters and things therein set forth are true in substance and in fact, except those matters alleged upon information and belief and as to those matters [8] he believes it to be true.

CHARLES B. CHRISTY.

Subscribed and sworn to before me this 25th day of October, 1915.

FRED A. LARSON,
Referee in Bankruptcy. [9]

[Endorsements]: M. 34. In the District Court of the United States for the District of Arizona. In

the Matter of Phoenix Hardware Company, Bankrupt. Petition for an Order Directing the Trustee to Make an Assessment and Call upon the Unpaid Subscriptions to the Stock of the Said Bankrupt for the Purpose of Paying Its Debts. Filed Oct. 25, 1915. Fred A. Larson, Referee. [10]

*In the District Court of the United States for the
District of Arizona.*

In the Matter of PHOENIX HARDWARE COMPANY,

Bankrupt.

Reply to Respondents to Order to Show Cause.

Come now J. B. Long, Margaret M. Long and M. West, by W. J. Kingsbury and Struckmeyer and Jenckes, their attorneys, and replying to the petition of Charles B. Christy, trustee in bankruptcy, for an order directing the trustee to make an assessment and call upon the unpaid subscriptions to the stock of the Proenix Hardware Company, bankrupt, for the purpose of paying its debts, respectfully show as follows:

I.

Respondents demur to the petition on the ground that said petition does not state facts sufficient to authorize this Court to levy an assessment upon the capital stock of said Phoenix Hardware Company belonging to respondents.

WHEREFORE respondents pray that the order of this Court requiring respondents to show cause why such assessment should not be levied be vacated

and the petition dismissed.

II.

Further answering respondents interpose their plea in bar to said petition on the ground that said petition on its face shows that the assessment upon the said capital stock of the Phoenix Hardware Company owned by respondents is barred by the statute of limitations of the State of Arizona, to wit, paragraphs 711 and 714, Revised Statutes, Arizona, 1913.

WHEREFORE respondents pray that the order of this Court requiring respondents to show cause why such assessment should not be levied be vacated and the petition dismissed. [11]

III.

And should the above demurrer and plea in bar be overruled by the Court the respondents further replying to said petition admit the allegations contained in paragraphs I, II, III, IV, V, and XI, and deny each and every other allegation in said petition contained.

IV.

Further answering, respondents allege that they acquired the number of shares of capital stock of said Phoenix Hardware Company owned by each of them by the sale to said Phoenix Hardware Company of a certain stock of merchandise of the value of Twenty Thousand Dollars; that respondents, nor any of them, did not subscribe for any number of shares of said capital stock or at all and that there is not now due to the Phoenix Hardware Company from respondents or any of them any sum whatsoever upon any unpaid subscription.

That these respondents, or any of them, have not, either as officers of said Phoenix Hardware Company or otherwise, obtained credit from anyone for goods, wares, and merchandise or money sold or advanced to said Phoenix Hardware Company upon any representation or statement that said Phoenix Hardware Company had a capital stock of Fifty Thousand Dollars fully paid up, or any capital stock or at all, and that any credit obtained by said Phoenix Hardware Company was extended solely on account of the stock of merchandise owned by said Phoenix Hardware Company and upon statements of the financial condition of the Company given from time to time to Bradstreet and Dun commercial agencies.

WHEREFORE respondents pray that the said petition be dismissed and that an order be entered herein declaring the stock of respondents in said Phoenix Hardware Company to be nonassessable.

W. J. KINGSBURY,

STRUCKMEYER & JENCKES,

Attorneys for Respondents. [12]

State of Arizona,
County of Maricopa,—ss.

J. B. Long, being first duly sworn, upon his oath deposes and says that he is one of the respondents in the above-entitled matter and makes this affidavit for and on behalf of himself and his co-respondents in said matter, to wit, J. W. Long, Margaret M. Long, and M. West; that he has read the foregoing reply to the petition of Charles B. Christy, trustee, for an order to show cause, and knows the contents thereof

and that the same is true of his own knowledge except as to such matters therein alleged on information and belief, and as to such matters he believes it to be true.

JOHN B. LONG.

Subscribed and sworn to before me this 29th day of November, 1915.

JOSEPH S. JENCKES,
Notary Public.

My commission expires February 16, 1916. [13]

[Endorsements]: M. 41. No. ——. In the United States District Court in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. Reply of Respondents to Order to Show Cause. Filed Nov. 29, 1915, 2:30 P. M. Fred A. Larson, Referee. Struckmeyer & Jenckes, Attorneys for Respondents. [14]

*In the District Court of the United States for the
District of Arizona.*

In the Matter of PHOENIX HARDWARE COMPANY, Bankrupt.

**Findings of Fact and Order Directing Trustee to
Make an Assessment on Each Share of Stock.**

This matter is before the referee upon petition of trustee for an order to show cause why M. West, J. B. Long, J. W. Long and Margaret M. Long should not be assessed on each share of stock of the Phoenix Hardware Company, subscribed to by them, at the rate of 34% on the par value thereof.

An answer was filed on behalf of each and all of said respondents which (after demurring to the petition on the grounds that it did not state facts sufficient to authorize the Court to levy an assessment upon the capital stock of said Phoenix Hardware Company, belonging to respondents; and upon the further ground that the proposed assessment is barred by the statute of limitation of the State of Arizona) alleges in substance:

That they acquired the shares of capital stock of said Phoenix Hardware Company, owned by each of them by the sale to said Phoenix Hardware Company of a certain stock of merchandise of the value of \$20,000; that respondents did not subscribe for their capital stock at all, but they do not deny that they own the number of shares of stock hereinafter stated.

The said respondents by their answer deny that either as officers of said company or otherwise obtained credit from anyone for goods, wares and merchandise or money sold or advanced to said Phoenix Hardware Company upon any representation or statement that the said Phoenix Hardware Company had a capital stock of \$50,000 fully paid up.

The referee, after an argument by the attorneys for the respective parties, overruled the *demur* and thereafter, to wit, on the 14th day of December, 1915, a hearing was had before this court, J. C. Forest appearing for the trustee and Struckmeyer & Jencks and W. J. [15] Kingsbury appearing for the respondents.

Testimony, both oral and documentary, was introduced on behalf of the trustee and the respondents, and the matter having been submitted to the Court for its consideration and decision, and after due deliberation thereon, Court finds the following facts and enters the order in accordance therewith:

FINDINGS OF FACT.

The Phoenix Hardware Company, bankrupt, was organized under the laws of the Territory, now State, of Arizona, during the month of March, 1907, with a capital stock of \$50,000, divided into 500 shares of the par value of \$100 each.

The said company was adjudicated bankrupt on the 24th day of October, 1914, and on the 20th day of November, 1914, Charles B. Christy became and now is the fully elected qualified and acting trustee of the bankrupt's estate.

The total amount of claims filed, allowed and remaining unpaid against the said estate amounts to the sum of \$5,838, and the statutory time for filing claims has long since expired.

The referee estimates that the necessary costs, disbursements, commissions, and counsel fees in connection with this matter would be \$665.

At the time of the hearing the trustee had in his hands a balance of funds applicable to the payment of these claims amounting to the sum of \$377.94, said balance being also subject to the payment of costs, disbursements, commissions, and counsel fees.

The only remaining assets of this estate are certain book accounts, which are not collectible, and unpaid subscriptions to the stock of said bankrupt.

The original and only subscribers to the stock of said company, and the amount subscribed for by each, on the 19th day of March 1907, are the following:

M. West	250 shares,
J. B. Long	130 shares,
J. W. Long.....	80 shares,
Margaret M. Long.....	40 shares.

That each of said subscribers have paid on said subscription at the rate of 20% of their par value or \$20 per share, and their [16] par value of \$80 per share.

The referee further finds that the said subscribers paid for the entire capital stock of said company the sum of \$10,000, and with said sum the said Phoenix Hardware Company, by and through its duly authorized officers and agents, purchased a stock of goods from the Arizona Hardware & Vehicle Company and paid therefore the sum of \$10,000.

That no part of the 80% of the par value of said stock or \$80 per share has ever been paid into the treasury of the said Phoenix Hardware Company bankrupt, by said subscribers or any or either of them or by anyone for them, but by agreement made at the day of the subscriptions the amounts paid thereon, by each of said subscribers were credited to each of said subscribers and the balance unpaid of the par value thereof was, in effect, credited by discount and the stock account between the said bankrupt corporation and said subscribers was balanced by such discount. *The* That the facts herein set forth was in effect a representation to the public

by the officers, managers, and agents of said corporation bankrupt, that all its capital stock had been subscribed for, and had been paid in full.

That at the time of the organization of said company its articles of incorporation designated J. B. Long, J. W. Long and M. West the Board of Directors of said corporation, and that ever since the said date they have continued to be and now are the Board of Directors of said corporation bankrupt.

That on the 19th day of March, 1907, the said Board of Directors elected the following named persons as the officers of said corporation, to wit:

J. B. Long.....President

J. W. Long.....Secretary-Treasurer

and W. J. Kingsburry was appointed the legal agent of said corporation, and that said last-named parties are still the duly elected, qualified and acting officers of said corporation bankrupt.

The referee further finds that said subscribers for the stock of said company are liable to the trustee of said bankrupt estate for the unpaid amounts on such subscriptions, or so much thereof as [17] may be necessary to pay the debts of the bankrupt estate, and that an assessment of 33% upon the par value of each share of stock of said Phoenix Hardware Company bankrupt owed by each of said subscribers, if credited with the amount heretofore paid thereon by each of said stockholders, would equalize the burden upon the said stockholders and also bring into the hands of the trustee of said estate a sufficient amount to pay the debts of the said bankrupt estate

and the necessary costs, disbursements, expenses, and counsel fees in the prosecution of this proceeding.

ORDER.

And now, to wit, this 15th day of March, 1916, on the petition of Charles B. Christy, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 3, 1915, signed by Fred A. Larson, referee in bankruptcy, why M. West, J. B. Long, J. W. Long and Margaret M. Long should not be assessed at the rate of 34% of the par value on each share of stock of the said bankrupt company, subscribed to by them, and it appearing that due service of said order to show cause has been made on the said M. West and that she has subscribed and not fully paid for 250 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing J. C. Forest for the petitioner and J. S. Jencks in opposition and after due deliberation had,—

It is ordered and decreed that M. West is liable in the sum of 33% of the par value of 250 shares of the stock of said Phoenix Hardware Company subscribed for by her, less \$5,000 paid thereon, or in the sum of \$3,250, on her said subscription, to the trustee of the estate of said Phoenix Hardware Company, in said sum, and that she make payment thereof to Charles B. Christy, trustee, in bankruptcy of Phoenix Hardware Company, bankrupt, at Phoenix, Arizona, within 20 days from the date of this order, and on or before the 5th day of April, 1916, said subscription when paid and collected to become a part of the assets of the said bankrupt estate, and

to be accounted for and disbursed under the orders of this court.

In default of such payment Chas. B. Christy, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said M. West as are necessary to recover the said [18] sum due by her on said stock either at law or in equity.

FRED A. LARSON,
Referee.

ORDER.

And now, to wit, this 15th day of March, 1916, on the petition of Charles B. Christy, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 3, 1915, signed by Fred A. Larson, referee in bankruptcy, why M. West, J. B. Long, J. W. Long, and Margaret M. Long should not be assessed at the rate of 34% of the par value on each share of stock of the said bankrupt company, subscribed to by them, and it appearing that due service of said order to show cause has been made on the said J. B. Long, and that he has subscribed and not fully paid for 130 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing J. C. Forest for the petitioner and J. S. Jencks in opposition, and after due deliberation had,—

It is ordered and decreed that J. B. Long is liable in the sum of 33% of the par value of 130 shares of the stock of said Phoenix Hardware Company subscribed for by him, less \$2,600, paid thereon, or in

the sum of \$1,690, on his said subscription, to the trustee of the estate of said Phoenix Hardware Company, in said sum, and that he make payment thereof to Charles B. Christy, trustee in bankruptcy of Phoenix Hardware Company, bankrupt, at Phoenix, Arizona, within 20 days from the date of this order, and on or before the 5th day of April, 1916, said subscription when paid and collected to become a part of the assets of the said bankrupt estate, and to be accounted for and disbursed under the orders of this Court. In default of such payment Chas. B. Christy, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said J. B. Long as are necessary to recover the said sum due by him on said stock either at law or in equity.

FRED A. LARSON,
Referee. [19]

ORDER.

And now, to wit, this 15th day of March, 1916, on the petition of Charles B. Christy, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 3d, 1915, signed by Fred A. Larson, referee in bankruptcy, why M. West, J. B. Long, J. W. Long, and Margaret M. Long should not be assessed at the rate of 34% of the par value on each share of stock of the said bankrupt company, subscribed to by them, and it appearing that due service of said order to show cause has been made on the said J. W. Long, and that he has subscribed and not fully paid for 80 shares of stock of said bankrupt, and an answer

having been filed and testimony having been taken, and after hearing J. C. Forest for the petitioner and J. S. Jencks in opposition and after due deliberation had,—

It is ordered and decreed that J. W. Long is liable in the sum of 33% of the par value of 80 shares of the stock of said Phoenix Hardware Company, subscribed for by him, less \$1,600, paid thereon, or in the sum of \$1,040, on his said subscription, to the trustee of the estate of said Phoenix Hardware Company, in said sum, and that he make payment thereof to Charles B. Christy, trustee in bankruptcy of Phoenix Hardware Company, bankrupt, at Phoenix, Arizona, within 20 days from the date of this order, and on or before the 5th day of April, 1916, said subscription when paid and collected to become a part of the assets of the said bankrupt estate, and to be accounted for and disbursed under the orders of this court.

In default of such payment Chas. B. Christy, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said J. W. Long as are necessary to recover the said sum due by him on said stock either at law or in equity.

FRED A. LARSON,
Referee.

ORDER.

And now, to wit, this 15th day of March, 1916, on the petition of Charles B. Christy, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 3d, 1915,

signed by Fred A. Larson, referee in bankruptcy, why M. West, J. B. Long, J. W. Long and Margaret M. Long should not be assessed [20] at the rate of 34% of the par value on each share of stock of the said bankrupt company, subscribed to by them, and it appearing that due service of said order to show cause has been made on the said Margaret M. Long, and that she has subscribed and not fully paid for 40 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing J. C. Forest for the petitioner and J. S. Jencks in opposition, and after due deliberation had,—

It is ordered and decreed that Margaret M. Long is liable in the sum of 33% of the par value of 40 shares of the stock of said Phoenix Hardware Company subscribed for by her, less \$800, paid thereon, or in the sum of \$520, on her said subscription, to the trustee of the estate of said Phoenix Hardware Company, in said sum, and that she make payment thereof to Charles B. Christy, trustee in bankruptcy of Phoenix Hardware Company, bankrupt, at Phoenix, Arizona, within 20 days from the date of this order, and on or before the 5th day of April, 1916, said subscription when paid and collected to become a part of the assets of the said bankrupt estate, and to be accounted for and disbursed under the orders of this Court.

In default of such payment Chas. B. Christy, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said J. W. Long as are necessary to recover

the said sum due by him on said stock either at law or in equity.

FRED A. LARSON,
Referee. [21]

[Endorsements]: No. —. M. '43. In the District Court of the United States for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. Findings of Fact and Order Directing Trustee to Make an Assessment on Each Share of Stock. Filed March 15, 1916. Fred A. Larson, Referee. [22]

*In the District Court of the United States for the
District of Arizona.*

Before FRED A. LARSON, Esq., Referee in
Bankruptcy.

In the Matter of PHOENIX HARDWARE COM-
PANY, a Corporation,
Bankrupt.

Testimony.

BE IT REMEMBERED that pursuant to notice, the hearing upon the petition of the Trustee, praying for an order directing the Trustee to levy an assessment upon the unpaid subscriptions to the capital stock of the Phoenix Hardware Company, the above-named bankrupt, came on to be heard before Fred A. Larson, Esq., Referee in Bankruptcy, at the City of Phoenix, Maricopa County, State of Arizona, on the 14th day of December, 1915, at eleven o'clock A. M.

APPEARANCES:

J. C. FOREST, Esq., for the Trustee.

W. J. KINGSBURY, Esq., and JOSEPH S. JENCKES, Esq., for the Respondents.

RAYMOND ALLEE was duly sworn as reporter, truly and correctly to take down in shorthand and transcribe into longhand the testimony adduced and proceedings had at the hearing; and

Testimony of J. B. Long, for the Trustee.

Thereupon [23] J. B. LONG, being called as a witness and first duly sworn, testified as follows:

Direct Examination by Mr. FOREST.

Mr. FOREST.—Shall we proceed? Are you ready to go ahead?

Mr. JENCKES.—I think, before we proceed, I will ask your Honor to enter an objection on the part of the respondents to the introduction of any evidence in support of the allegations of the petition, merely by way of demurrer. The general demurrer having been overruled, we now object to the introduction of any evidence in support of the allegations of the petition on the ground that the petition does not state facts sufficient to warrant the Referee in levying any assessment against the stock of these respondents.

The REFEREE.—Overrule the objection.

Mr. FOREST.—Q. Your name is J. B. Long?

A. Yes, sir.

Q. You are acquainted with the corporation known as the Phoenix Hardware Company? A. Yes, sir.

Q. And that is the same company that has been

(Testimony of J. B. Long.)

adjudged a bankrupt? A. Yes, sir.

Q. What official position did you hold in that company, if any, Mr. Long? A. President.

Q. Were you also a director in the company?

A. Yes, sir. [24]

Q. I hand you here what purports to be a certified copy of the articles of incorporation of the Phoenix Hardware Company, now a bankrupt. Will you state, Mr. Long, if these are the articles?

A. The fact that this is certified by the Corporation Commission—it is probably correct. That makes it correct.

Mr. JENCKES.—I suppose they are the articles.

Mr. FOREST.—Yes; it is certified by the Commission.

Mr. JENCKES.—No; we have no objection.

Mr. FOREST.—I ask that it be introduced in evidence as Trustee's Exhibit No. 1.

(Copy of articles of incorporation, certified by the Corporation Commission, was received in evidence by the Referee and marked "Trustee's Exhibit No. I.")

Q. Upon the filing of the articles of incorporation was there a meeting held by you and associates, in which a board of directors was elected?

A. Yes, sir.

Q. They were also named in the articles of incorporation, were they? A. I think so.

Q. On the 19th of March, 1907, did the Board of Directors hold a meeting? A. Yes, sir.

Q. I submit here what purports to be the minutes

(Testimony of J. B. Long.)

of the first meeting of the Board of Directors of the Phoenix Hardware Company, held in the office of the company, at Phoenix, Arizona, March 19th, 1907, and ask if you are [25] familiar with that.

A. It is all correct.

Mr. FOREST.—I offer this in evidence as Trustee's Exhibit No. 2.

The REFEREE.—Any objection, Mr. Jenckes?

Mr. JENCKES.—You have examined that, Mr. Kingsbury? No objection to it.

Mr. KINGSBURY.—Yes.

Mr. JENCKES.—No objection to it.

(Copy of minutes of first meeting of Board of Directors of Phoenix Hardware Company was received in evidence by the Referee and marked "Trustee's Exhibit No. 2.")

Mr. FOREST.—Q. At that meeting, Mr. Long, you, yourself, Mr. J. B. Long, were elected president of the company? A. Yes, sir.

Q. And W. J. Kingsbury was appointed statutory agent? A. Yes, sir.

Mr. JENCKES.—We object to these questions because the instrument is the best evidence.

Mr. FOREST.—That is true, but I am getting these names for the purpose of other questions.

Mr. JENCKES.—Yes; but merely for the purpose of shortening up the record—

The REFEREE.—Those questions are to be connected with others, Mr. Forest?

Mr. FOREST.—Yes; that is the purpose.

Q. And who was elected secretary?

(Testimony of J. B. Long.)

A. J. W. Long. [26]

Q. And treasurer? A. J. W. Long.

Q. And that constituted all the officers that were elected? A. Yes, sir.

Q. Since that time, March 19th, 1907, has the Board of Directors ever held a meeting?

A. Yes, sir.

Q. Have you a minute entry of it?

A. I don't know of any in existence. We had a great many meetings.

Q. Formal or informal? A. Informal.

Q. Was there any record kept of those meetings, Mr. Long? A. I think not.

Q. If so, you have no such records now?

A. We have none; no.

Q. And you know of no such records?

A. No. There was one or two instances where formal meetings were held, and records kept, and the minutes taken; but as to the whereabouts of those minutes, I don't know.

Q. Let me ask you, to cut it short, was there ever any stockholders' meeting?

A. Nothing different.

Q. From what is disclosed by this exhibit No. 2? Nothing except what is disclosed by Trustee's Exhibit No. 2?

A. As I said before, there were one or two formal [27] meetings held.

Q. That was by the Board of Directors?

A. By the Board of Directors.

Q. Now, you say there was no stockholders' meet-

(Testimony of J. B. Long.)

ings except such as are disclosed by exhibit No. 2 which we have put in evidence; is that correct?

A. I think that is correct.

Q. Now, Mr. Long, the Board of Directors as they appear in the articles of incorporation are still the Board of Directors of that corporation, are they not? There never has been any new board elected since the organization of the company?

A. There never has been any change in the Board of Directors.

Q. And the officers who were elected at the meeting disclosed by Trustee's Exhibit No. 2 are the same officers now as they were then; and they have continued as officers from the time of the organization to the present time? A. That is correct.

Q. You testified before the Referee on a former occasion, did you not, Mr. Long? A. Yes, sir.

Q. Upon the organization of the company, what, if any, assets did the company take over?

A. Well, upon the organization of the company, they took over a stock of merchandise.

Q. Formerly belonging to whom?

A. Well, belonging at that time to J. B. Long and [28] M. West—formerly belonging to the Arizona Hardware and Vehicle Company.

Q. That stock of goods had been taken over by J. B. Long and M. West? A. Yes.

Q. Now, that was the stock of goods, then, that was taken over by the Phoenix Hardware Company from J. B. Long and M. West? A. Yes, sir.

Q. When was that taken over with reference to the

(Testimony of J. B. Long.)

date of the organization of the company?

Q. On that date.

Mr. JENCKES.—Q. What date was that?

A. March 19th, 1907.

Mr. FOREST.—Q. What transfer was made to the company by M. West and J. B. Long?

A. I don't remember whether there was a bill of sale executed or not; but my recollection is that it was simply a verbal turn—over of the stock of merchandise.

Q. That is to say, if I understand correctly, you turned over the possession of the stock of goods to the Phoenix Hardware Company?

A. To the Phoenix Hardware Company.

Q. The Phoenix Hardware Company, then, if I understand correctly, purchased this stock of goods from yourself and M. West? A. Yes, sir.

Q. What was the consideration paid for that stock [29] of goods?

Mr. JENCKES.—Object to that, if your Honor please, as immaterial, irrelevant and incompetent.

Mr. FOREST.—It is the very gist of the case.

Mr. JENCKES.—The value of the stock of merchandise—they may have bought it for a very small amount.

Mr. FOREST.—It will show exactly what the price was that they paid for that stock of goods.

Mr. JENCKES.—It is not what they paid for it. It is the value of it.

Mr. FOREST.—It is what the Phoenix Hardware Company paid for it.

(Testimony of J. B. Long.)

Mr. JENCKES.—I thought you were asking what they paid for it. I withdraw the objection if that is the question. I did not understand the question.

The REFEREE.—Answer the question.

Mr. JENCKES.—Let us have the question read.

(Question read by the reporter: "What was the consideration paid for that stock of goods?")

Mr. JENCKES.—We object to the question as indefinite.

The REFEREE.—What do you mean? Paid by whom?

Mr. FOREST.—Read the former question.

(Former question read by the reporter.)

Mr. FOREST.—Perfectly plain, now.

A. The consideration was the stock of the Phoenix Hardware Company—the corporation stock.

Q. Now, Mr. Long, when this stock of goods was purchased by you and M. West, what was the consideration paid [30] for that, and who paid it?

Mr. JENCKES.—I object to that, if your Honor please—incompetent, irrelevant and immaterial.

Mr. FOREST.—That is the very gist of it.

Mr. JENCKES.—It don't make any difference what they paid for it.

The REFEREE.—That was prior to the Phoenix Hardware Company's taking it over?

Mr. FOREST.—That particular transaction—it came right along—one entire transaction, and shows the actual money which was paid by Long and his associates for that stock of goods, and what was said about it, and what the agreement was as to the con-

(Testimony of J. B. Long.)

sideration for that stock of goods. The mere fact that they turned over all the stock to the company does not fix the value.

Mr. JENCKES.—It is not the consideration they paid for it, but the value of it. They may have bought it at ten per cent of its value, but if it had a market value of much more, that is the question in this case—the value of the merchandise which they gave for this stock.

The REFEREE.—Mr. Forest, what I want to get clear in my mind is this; you want to know what M. West and J. B. Long paid for this before they transferred it to the Phoenix Hardware Company?

Mr. FOREST.—Yes.

The REFEREE.—What is the purpose of it?

Mr. FOREST.—To show what the consideration was that actually went into that stock of goods, for which the entire [31] stock of the corporation was issued.

The REFEREE.—Would it be the same amount of stock as the stock of merchandise?

Mr. FOREST.—That is exactly what I propose to show. I cannot answer all of those question at once.

Mr. KINGSBURY.—How far back are you going? You want to show what M. West paid for a stock of hardware that came from the Arizona Hardware and Vehicle Company. Are you going still further back and find out what the Arizona Hardware and Vehicle Company paid for it, and are you going to the wholesaler and find out what the wholesaler paid for it? If it had a value, that is all there

(Testimony of J. B. Long.)

is to it as far as the plaintiff's case is concerned. It don't make any difference what they paid for it. It is the value of the stock—the value of the merchandise they exchanged for the capital stock. That is the issue right here, and I think the Court ought to confine the testimony to that issue.

The REFEREE.—I want to see the connecting link.

Mr. FOREST.—Very well, your Honor will recall the case where, in taking over a tailor establishment, they purchased the stock of goods for \$5,000. You remember that case?

The REFEREE.—Yes.

Mr. FOREST.—They put it in the company at the value of \$25,000 and issued stock to cover that amount. Can you find a more parallel case than this? And for the purpose of showing what the purchase price was, can we not go [32] in and show what these people paid for this, and let them put in such proof as they desire for the purpose of showing the consideration that Long and West paid for this—what it actually cost them?

The REFEREE.—They afterwards transferred to the Phoenix Hardware Company—

Mr. KINGSBURY.—But the testimony is that the merchandise was bought before the transfer was made.

The REFEREE.—For the present, I will overrule the objection.

Mr. JENCKES.—Is it your ruling that the burden is on us to prove the actual value? They come

(Testimony of J. B. Long.)

in and make these allegations. Their allegation is that we paid a certain amount of money for this, and now they seek to show that we transferred a stock of merchandise. Now, that is absolutely immaterial to the issues. If the stock was purchased at ten cents on the dollar, it certainly had a valuation of more than ten cents on the dollar; and they had a right to turn it over at its actual value. Its actual value is the only thing that we are concerned with in this inquiry.

The REFEREE.—I agree. If there is no connecting link, I will exclude it.

Mr. JENCKES.—I cannot see anything that it will connect up with at all—to bring out that they paid much less than they turned it over to the company for.

The REFEREE.—For the present, I will overrule the objection. [33]

Mr. JENCKES.—We will note an exception to the ruling of the Court.

(Question read by the reporter: “Now, Mr. Long, when this stock of goods was purchased by you and M. West, what was the consideration paid for that, and who paid it?”)

A. The consideration was approximately \$10,000 cash, paid by J. B. Long and M. West.

Mr. FOREST.—Q. Now, what if any payment did you make, either by notes, securities or otherwise, towards the \$10,000? A. How is that?

Q. What if any payment did you make by way of notes or any other securities towards this \$10,000?

(Testimony of J. B. Long.)

Mr. JENCKES.—We object to that question.

Mr. KINGSBURY.—He said they paid \$10,000 in cash. That answers the question.

The REFEREE.—For the purpose of seeing the ultimate link, I will permit this to go in; and if I do not see the link, I will exclude it.

A. Are you asking this question to find out where I got hold of the money to pay for my portion?

Mr. FOREST.—Q. You testified upon a former occasion that you put up \$5,000 in notes?

A. That was practically true, but I did not go far enough to say for what those notes were signed.

Q. Before you explain, state where or not you did put up \$5,000 in notes.

Mr. KINGSBURY.—We object, if the Court please. The question is too indefinite. [34]

Mr. FOREST.—Will you let the witness answer?

A. I borrowed \$5,000 to pay for my portion of that stock.

Q. That is, your portion of the \$10,000?

A. My portion of the \$10,000.

Q. You borrowed \$5,000? A. Yes, sir.

Q. And you did pay in, then, \$5,000 of the \$10,000 for this stock of goods; is that correct?

A. Yes, sir; for my portion.

Q. And you gave your notes to somebody as security for that loan of \$5,000? A. Yes, sir.

Mr. KINGSBURY.—I object, if the Court please.

The REFEREE.—He has not asked where he got the \$5,000.

Mr. FOREST.—But I am going to ask.

(Testimony of J. B. Long.)

Mr. JENCKES.—You understand that our objection goes to this whole line of testimony?

The REFEREE.—Yes.

Mr. FOREST.—Now, Mr. Long, did you have some conversation with Mr. Kingsbury regarding this transaction? A. Yes, sir.

Q. Who was Mr. Kingsbury representing?

A. Well—

Q. From your understanding?

A. Mr. Kingsbury was representing parties that had made this loan.

Q. I mean with reference to yourself and M. West in [35] the transaction. I don't care about the people you borrowed the money, for the present. Who was Mr. Kingsbury representing in the transaction between yourself, M. West and the Phoenix Hardware Company?

A. Mr. Kingsbury was representing M. West.

Q. Now, did you have a conversation with Mr. Kingsbury with reference to the \$5,000 that you should put up? A. I certainly did.

Q. Yes. What was said?

Mr. JENCKES.—We object to that, if your Honor please.

Mr. FOREST.—He was representing M. West, one of the officers and a director of this company, and a stockholder.

Mr. JENCKES.—What difference does it make what conversation he had with Mr. Kingsbury, or anybody, with reference to this stock of hardware?

Mr. FOREST.—We are getting at the money.

(Testimony of J. B. Long.)

Mr. JENCKES.—What difference does it make where they got the money, if he got the money and put it up and stood responsible?

Mr. FOREST.—Because we are going to show, further, who he paid that money back to.

Mr. JENCKES.—What difference does it make to whom he paid the money?

The REFEREE.—Mr. Forest, what is your purpose? What do you intend to bring out?

Mr. FOREST.—We have alleged that this transaction was fraudulent. Now, we have the right to show the entire transactions between these people, including Mr. Kingsbury, [36] who, it is disclosed here, was representing the principal stockholder, M. West. Now, we want to show all about the whole transaction in order to show that it was fraudulent at law. No matter how honest this transaction might have been between these parties as a matter of fact, if conditions develop in law that it was fraudulent, we have a right to a decree in this case.

The REFEREE.—Overrule the objection.

Mr. JENCKES.—We except to the ruling of the Court.

Mr. FOREST.—Q. What was said to Mr. Kingsbury in that regard, concerning the \$5,000 you were to put up?

Mr. JENCKES.—Now, we enter the further objection that any communication between Mr. Long and Mr. Kingsbury was a communication between

(Testimony of J. B. Long.)

them as attorney and client, and they cannot be compelled to testify to it.

Mr. FOREST.—That don't appear to be true. That has not been disclosed. The testimony was that he was the attorney for M. West.

The REFEREE.—I understood that he said he was the agent.

Mr. JENCKES.—Well, I would like to ask Mr. Long as to that, as to whether or not Mr. Kingsbury was representing all of these parties who bought out this stock of hardware as the attorney?

A. Why, yes; he was appointed the agent of the company.

Q. The agent of the company, that is true.

A. The representative and attorney for the Phoenix Hardware Company. [37]

Mr. JENCKES.—The attorney—now, on that state of facts, we object to it.

The REFEREE.—He said he was the agent.

Mr. JENCKES.—Q. Was Mr. Kingsbury your attorney before the hardware company was organized?

A. No; he was not my attorney. He was my broker in a sense.

Mr. JENCKES.—We insist that the relation of attorney and client existed.

Mr. FOREST.—He says not.

The REFEREE.—I don't see it from the testimony of Mr. Long. He denies that he was his attorney.

Mr. JENCKES.—Now, he says he was the attorney for the Phoenix Hardware Company. He was the president of the Phoenix Hardware Company,

(Testimony of J. B. Long.)

and the relation of attorney and client must have existed between the president and the attorney of the company.

Mr. FOREST.—Now, your Honor, a corporation is an entirety of itself.

The REFEREE.—Mr. Long may answer the question.

A. Previous to the formation of the company I did not have any attorney representing me.

Mr. FOREST.—Now, we insist that he answer the last question.

The REFEREE.—He may answer.

(Question read by the reporter: “What was said to Mr. Kingsbury in that regard, concerning the \$5,000 you *were put up?*” [38])

A. I am at a loss to answer that intelligently. It would take some time to go over the entire conversation.

Mr. FOREST.—Q. What was done about the \$5,000 between yourself and Mr. Kingsbury?

A. I asked Mr. Kingsbury, as broker, if he could secure \$5,000 for me to buy one-half of that stock; and he said he thought he could; and we talked the matter over.

The REFEREE.—Q. What stock was that?

A. The stock of the Arizona Hardware and Vehicle Company, previous to the purchase by myself and M. West.

Mr. FOREST.—Q. Go ahead. What else was done?

A. And I told him at the time that if he could, I

(Testimony of J. B. Long.)

was willing to stand the commission; and that was all.

Q. Did you secure the money? A. Yes.

Q. And you paid that in as one-half of the purchase price of the stock of goods? A. Yes, sir.

Q. And the \$5,000 that Mr. Kingsbury put up for M. West paid the other \$5,000? A. Yes, sir.

Q. And that stock of goods was turned over to the company just exactly as you purchased it?

A. Yes, sir.

Q. That constituted your stock in trade at that time, did it? A. Yes, sir.

Q. That is, of the Phoenix Hardware Company?
[39] A. Yes, sir.

Q. That was all the property you had? A. Yes.

Q. Did the company owe any debts at that time?
A. No, sir.

Q. Did you subsequently pay back that \$5,000?

Mr. JENCKES.—We object to that, if your Honor please. What is the purpose of it?

Mr. FOREST.—We are going to ask to whom he paid it.

Mr. JENCKES.—What difference does it make? They transferred the stock of goods to the Phoenix Hardware Company. They got the stock of goods. What difference does it make? It is encumbering the record with a lot of stuff that don't make any difference.

The REFEREE.—I don't see the relevancy of that question. He said he paid it. I don't know

(Testimony of J. B. Long.)

where the relevancy comes in as to whether he paid it back.

Mr. FOREST.—Q. Now, upon this transaction having taken place, how many shares—I will ask you to testify from the record. You recognize this? This is the stock-book of the company, Mr. Long?

A. Yes, sir.

Q. State whether or not the stubs of the stock-book which you now have in your hands disclose correctly the number of shares issued to each individual.

Mr. JENCKES.—We object to that. The stock book is here. It is the best evidence.

Mr. FOREST.—But we want to know if it is correct. [40]

Mr. JENCKES.—First, you must introduce the book.

Mr. FOREST.—If you want to be that formal—

Mr. JENCKES.—Yes; we want to be that formal.

Mr. FOREST.—Have you any objection?

Mr. JENCKES.—Not if that is the record of the company.

Mr. FOREST.—Q. State whether or not that is the stock-book of the company, Mr. Long.

A. Yes.

Q. You say that is the stock-book?

A. Yes, sir.

Mr. FOREST.—Now, we offer it in evidence. Mr. Jenckes, have you any objection?

Mr. JENCKES.—We object to the introduction of the book on the grounds that it does not tend to prove any of the issues in the case or prove the fact

(Testimony of J. B. Long.)

of the stock subscription. The petition alleges that there were subscriptions for stock, and finally the stock was issued at a certain price. Now, they should, before they introduce the stock, show there was a subscription for the stock.

The REFEREE.—Mr. Forest, what is the purpose of introducing this in the record?

Mr. FOREST.—To show the full amount of the stock which was issued, and to whom, and how many shares each received. That is the purpose.

Mr. KINGSBURY.—If the Court please, M. West could not be bound by this stock-book, because the secretary was J. W. Long.

The REFEREE.—The president has indentified it, [41] Mr. Kingsbury.

Mr. KINGSBURY.—That is not the point. It might be the stock-book, but the officers could sit down and write stock to anybody. Do you mean to say this would make a contract between John Smith and this company, under which John Smith would be liable? There is only one way to buy stock and bind yourself, and that is by subscription. That is the first thing to introduce.

Mr. FOREST.—Do you see how ridiculous that is? Suppose no subscription was ever made.

The REFEREE.—I will admit it.

Mr. JENCKES.—I think he should first show that there was no subscription.

Mr. FOREST.—I ask that this be marked "Trustee's Exhibit No. 3."

Mr. JENCKES.—Note an exception.

(Testimony of J. B. Long.)

(Stock-book of Phoenix Hardware Company was received in evidence by the Referee and marked "Trustee's Exhibit No. 3.")

Mr. FOREST.—Q. Now, Mr. Long, you were present when an agreement in the first place was made between you and among you and your associates with reference to the issuance of stock?

Mr. JENCKES.—We object to that on the ground that there is nothing as yet to show that there was such an agreement.

The REFEREE.—I think the question embodies that.

Mr. JENCKES.—If there was such an agreement, I would [42] like to know whether it was in writing.

Mr. FOREST.—You wanted to hurry through this, but you are making it long by your objections.

Q. I will ask, Mr. Long: Was there any agreement between yourselves and among yourselves, you and your associates in this corporation,—any written agreement as to taking stock in the company?

A. No, sir.

Q. What was done? What agreement was reached among you in the first instance about the issuance of stock?

A. It was that M. West should have one-half of the stock, and myself the other one-half of the capital stock of the Phoenix Hardware Company.

Q. Was there any objection to that in the first instance by yourself?

A. In our first conversation regarding the propo-

(Testimony of J. B. Long.)

sition, when I and my associates met, I suggested that we should issue \$20,000 of the capital stock.

Q. In payment?

A. In payment for the stock of merchandise. After talking the matter over, we decided to issue all of the stock.

Q. Who suggested that you issue all of the stock?

A. Mr. Kingsbury suggested that, I think. That is my recollection.

Q. And, therefore, you did issue all of the stock?

A. Yes, sir; the stock was issued entirely.

Q. Now, I will refer to the book again, and ask you [43] to look at the stubs and state whether or not those stubs of Trustee's Exhibit No. 3 properly disclose the amount of stock issued and to whom issued.

Mr. JENCKES.—We object, if your Honor please, to the question upon the ground that it is incompetent, irrelevant and immaterial, and cannot bind *these respondent*.

The REFEREE.—Objection overruled.

Mr. JENCKES.—Exception.

A. It is all correct there, as it stands.

Mr. FOREST.—You may cross-examine.

Mr. JENCKES.—Now, if your Honor please, we desire to move to strike the testimony of Mr. Long as to the amounts paid by him and M. West for this stock of merchandise, and as to the borrowing of \$5,000 with which to pay for it.

The REFEREE.—Mr. Forest, are you through?

(Testimony of J. B. Long.)

Mr. FOREST.—Through for the present. Of course, we object to that, if your Honor please, because we will offer additional testimony.

The REFEREE.—I want to ask a question before I rule.

Q. Mr. Long, this stock that you and Mrs. M. West bought from this Vehicle Company—

A. The Arizona Hardware and Vehicle Company.

Q. For \$10,000—was that the same identical stock that you put into the Phoenix Hardware Company?

A. Yes, sir.

Q. And you put that in at a capitalization of what?

A. Without any amount stated.

Q. The stock had not deteriorated? That is, you had [44] not taken anything from it? It was the same stock, the same quality and quantity that you put into the Phoenix Hardware Company?

A. Yes, sir.

Q. When you put that into the Phoenix Hardware Company— After you put that into the Phoenix Hardware Company, was any other stock added to it? A. Yes, sir.

Q. Approximately how much?

A. Approximately, \$1,800.

Q. \$1,800.

A. \$1,800 or \$1,900—I don't remember.

Q. That made it less than \$12,000 stock that you put in the Phoenix Hardware Company, all together?

A. I don't say that. I considered this stock of

(Testimony of J. B. Long.)

merchandise that I bought from the Arizona Vehicle Company to be worth \$20,000. The inventory price of that stock, at the cost to the Arizona Hardware and Vehicle Company, including the fixtures, amounted to considerably over \$20,000.

Q. What constituted the Arizona Hardware and Vehicle Company?

A. It was a corporation. There were a great many stockholders. I could not name them. J. H. La Rue was the president.

Q. Were you one of the Arizona Vehicle Company?

A. No, sir. I was an employee of the Arizona Hardware and Vehicle Company.

Q. Then after you got all of this stock, what did [45] you capitalize the Phoenix Hardware Company for?

A. The Phoenix Hardware Company was incorporated for \$50,000.

Q. For \$50,000? A. Yes, sir.

Q. With the stock of merchandise in there, as you have enumerated?

A. There was no reference made to the value of the stock we turned over.

Q. I understand, but what I mean: You capitalized the Phoenix Hardware Company for \$50,000?

A. It was capitalized for \$50,000.

Q. You started out with this stock that you bought from the Arizona Vehicle Company?

A. Arizona Hardware and Vehicle Company.

(Testimony of J. B. Long.)

Q. And this other stock, you say, of approximately \$1,800—that was the stock you started out with with the Phoenix Hardware Company? A. Yes, sir.

The REFEREE.—I deny the motion to strike.

Mr. JENCKES.—Note and exception.

Mr. FOREST.—Q. The stock of goods that you purchased from the Arizona Hardware and Vehicle Company was an old stock of goods through which the company was in rather a strained financial condition?

A. It was not an old stock, because the company had only been in business about a year or a year and a half; but they got into deep water financially, and turned the [46] entire stock of goods over to the creditors for them to realize on.

Q. And you purchased at a compromise sale from the creditors? A. Yes, sir.

Q. And it was on this stock of goods that you purchased from the Arizona Hardware and Vehicle Company that you incorporated the Phoenix Hardware Company, was it not? You took over that stock of goods?

A. The Phoenix Hardware Company took over that stock of goods.

Q. You issued the 50,000 shares of stock on that stock of goods? A. In payment for it.

Q. The \$1,800 that you spoke about went into the company afterwards?

A. It was added to it about that time.

Q. Where did you get that \$1,800 stock?

(Testimony of J. B. Long.)

A. That was the stock of goods I owned personally, previous to that.

Q. Had you previously been in the hardware business?

A. I owned that stock of goods at that time. It was paint and glass.

Q. And you turned that into the company?

A. I turned it in with the other stock.

Q. Did you turn in that \$1,800 stock in addition to the \$5,000 which you paid?

Mr. JENCKES.—I object to that as assuming something [47] not in evidence.

Mr. FOREST.—We are going to find out.

The REFEREE.—Overrule the objection.

A. That was put in as an assigned stock, for which I was to receive a credit later on.

Mr. FOREST.—Q. Oh, you were to receive a credit on the books of the company later on?

A. Yes.

Q. Did you receive a credit? A. Yes.

Q. Then, Mr. Long, the \$1,800 stock for which you afterwards received credit had nothing to do with the \$50,000 stock issue? A. In reality, no.

The REFEREE.—Are you through?

Mr. FOREST.—Yes.

The REFEREE.—We will now adjourn until 1:30. Everybody will be back here at 1:30 P. M.

(THEREUPON, the hearing stood adjourned until the hour of 1:30 P. M., at which hour it was resumed in due form, the Referee and counsel being present.)

(Testimony of J. B. Long.)

Cross-examination by Mr. KINGSBURY.

Q. You have testified that you and M. West procured this stock of merchandise from the Arizona Hardware and Vehicle Company, and paid \$10,000 for the same, in money? A. Yes, sir.

Q. What connection did you have with the Arizona Hardware and Vehicle Company at that time?

[48]

A. Previous to the purchase I had been in the position of manager under Mr. Epstein, who represented the creditors of the Company.

Q. Were you familiar with the stock of merchandise you and M. West purchased? A. I was.

Q. State whether or not it was a perfectly clean and good stock, or was it worn.

A. The stock was clean because it was new.

Q. What was the inventory value of that stock at wholesale cost?

A. It was a little over \$20,000.

Q. What would be the retail value of the stock?

Mr. FOREST.—That is immaterial. We object to that.

Mr. KINGSBURY.—We are talking about the value. You cannot tell how the Court will look at it. M. West and Long were not in the wholesale business.

The REFEREE.—I think, Mr. Kingsbury, the wholesale value would be governing.

Mr. KINGSBURY.—I don't see how you could hold such an opinion as that.

(Testimony of J. B. Long.)

The REFEREE.—Let him answer.

Mr. FOREST.—There cannot be any purpose. We would have to go in on cross-examination to find out what it would cost the company to sell that at retail in order to get at the true value.

The REFEREE.—Answer the question.

A. Why, the retail value would be \$29,000 or \$30,000. [49]

Q. On a percentage basis, how much?

A. Approximately fifty per cent advance over the wholesale.

Q. Now, you say that this merchandise—was there any subscription to the stock of the Phoenix Hardware Company signed by anyone? A. No.

Q. Now, you testified that this stock of merchandise was exchanged to the Phoenix Hardware Company for the capital stock of the Phoenix Hardware Company? A. Yes, sir.

Q. And that the capital stock was divided equally between you and M. West? A. Yes, sir.

Q. At the time of that exchange, what was the value of the capital stock of the Phoenix Hardware Company?

Mr. FOREST.—That is objected to. The record shows that. The capital stock is shown by the articles of incorporation here.

Mr. KINGSBURY.—That is where we differ. That is the par value. I did not say anything about the par value. The par value is in evidence, but the Court knows, I suppose, as a matter of common

(Testimony of J. B. Long.)

knowledge, and will take judicial notice of the fact that there is very little stock sold at par.

Mr. FOREST.—What is it you want to prove?

Mr. KINGSBURY.—It is not of any consequence.

Mr. FOREST.—What do you want it in the record for? [50]

Mr. KINGSBURY.—You never can tell when you get in the other court.

Mr. JENCKES.—I think it is material, if your Honor please.

(Question read by the reporter: “At the time of that exchange, what was the value of the capital stock of the Phoenix Hardware Company?”)

Mr. JENCKES.—He is not asking as to the par value. He is asking as to the market value of the Phoenix Hardware Company’s stock.

Mr. FOREST.—Entirely immaterial! Absolutely immaterial!

The REFEREE.—Go ahead and answer the question.

A. Previous to the time of making the trade, it had no value, because it had no assets.

Mr. KINGSBURY.—Q. Had no subscriptions?

A. Had no subscriptions and no assets.

Q. You testified in your direct examination that the board of directors of the Phoenix Hardware Company had numerous meetings.

A. They had numerous meetings.

Q. What do you mean by that—every month or twice a month?

(Testimony of J. B. Long.)

A. Sometimes two or three times a month—sometimes it might run sixty days.

Q. Were the affairs of the company discussed at those meetings? A. Yes.

Q. That was all that was discussed? [51]

A. Yes.

Q. Did you keep any minutes? A. No, sir.

Q. Why not?

A. Because there was nobody else interested besides myself and son and you, as the representative of Mrs. West. They were the only parties.

Q. You kept minutes that you made that were lost? A. Yes; there were some minutes.

Q. There was a fire?

Mr. FOREST.—We do not like to have the attorneys suggesting all the answers.

The REFEREE.—Do not put the answer in the witness's mouth.

Mr. KINGSBURY.—Q. Were there any minutes destroyed in the fire?

Mr. FOREST.—I object as leading. You cannot suggest the answer.

Mr. JENCKES.—You can on cross-examination.

Mr. FOREST.—I withdraw the objection.

A. I could not say that they were destroyed in the fire; but we lost many papers during that fire. They were wet and all obliterated.

Mr. KINGSBURY.—Q. Now, you say that this exchange of the capital stock of the Phoenix Hardware Company for the stock of merchandise was made—the agreement to make that exchange was

(Testimony of J. B. Long.)

made on March 19th, 1907, the date of Trustee's Exhibit No. 2? [52]

A. That was March 19th, 1907.

Q. Is that right? The agreement was made on that day? A. Yes, sir.

Q. The agreement, you say, was that yourself and M. West should transfer the merchandise and take all the capital stock of the Phoenix Hardware Company? A. The capital stock.

Q. That was the agreement? A. Yes, sir.

Q. That was done? A. Yes, sir; that was done.

Mr. KINGSBURY.—I think that is all the questions I will ask on cross-examination—Wait a minute.

A. My share of the stock was distributed among members of my family. It was not all made to me, personally. Some was made to myself, some to my son, and some to my wife.

Mr. FOREST.—Q. It was distributed as the stub-books and stock certificates indicate?

A. Yes, sir.

Q. That is—

A. One hundred and *forth*, eighty—I don't remember just exactly.

Mr. KINGSBURY.—Q. Mr. Forest has stated it correctly? A. Yes, sir; that is right.

Mr. FOREST.—Is that all, gentlemen?

Redirect Examination by Mr. FOREST.

Q. Mr. Long, is it not a fact that the stock of goods and merchandise—it was fixtures and the stock of goods, [53] was it not? A. Yes, sir.

(Testimony of J. B. Long.)

Q. All went to the Hardware Company?

A. Yes, sir.

Q. Is it not a fact that that was transferred directly from the Vehicle Company to the Hardware Company by a bill of sale?

A. Not according to my recollection—I could not say as to that, positively.

Q. That is a matter of very great moment; but for the sake of straightening it out—you have probably forgotten, Mr. Long. I don't think you intended to misstate the facts, but please examine that bill of sale and see if you recall it—the first part of it, and then you can look at the signature and soon see.

A. This bill of sale is made to the Phoenix Hardware Company.

Q. By whom?

A. Arizona Hardware and Vehicle Company, by Henry Morris, president. Now, my recollection—while this was made by Henry Morris, president, I cannot see why the name of the Phoenix Hardware Company was used, because the Phoenix Hardware Company at that time had not become an institution.

Mr. JENCKES.—What is the date of it?

Mr. FOREST.—That speaks for itself.

A. The 15th day of March.

Q. At any rate, Mr. Long, the stock of goods mentioned [54] is the same stock of goods which you and Mrs West turned over to the Hardware Company? A. Yes, sir.

Q. When was the fire which destroyed certain portions of the Hardware Company's property?

(Testimony of J. B. Long.)

A. It was in August, 1912.

Mr. JENCKES.—What was that question?

Mr. FOREST.—When the fire took place.

Q. Were there ever any meetings of the board of directors after that? A. Yes, sir.

Q. Did you keep minute entries of those?

A. There was minutes made of that meeting. I don't know what became of them.

Q. You have not got them now? A. No, sir.

Q. You have seen such minutes, have you?

A. Yes, sir.

Mr. FOREST.—That is all.

The REFEREE.—Q. Part of this property that you and Mrs. M. West purchased from the Arizona Vehicle Company—did that include fixtures in addition to the stock?

A. It included the stock and fixtures on a contract.

Q. How much would you estimate the fixtures to have been worth?

A. I cannot recall how much valuation was placed on the fixtures, now, but approximately the inventory showed the fixtures at something like \$5,000. They cost that, [55] but the valuation placed on them was in the neighborhood of \$1,800 or \$1,900.

Q. That was included in that \$10,000?

A. The stock that was purchased.

Mr. FOREST.—Q. That was included in the inventory? A. Yes.

The REFEREE.—Q. So, you put the stock of fixtures in the Phoenix Hardware Company, and they went to make up part of the capitalization?

(Testimony of J. B. Long.)

A. That is what was traded to M. West and J. B. Long.

Mr. FOREST.—Q. Did you say that it invoiced something like \$20,000?

A. Something over \$20,000.

Mr. JENCKES.—Wholesale value?

Mr. FOREST.—Q. That is the way all inventories are made, Mr. Long?

The REFEREE.—That is what I want to know—goods and fixtures worth \$20,000.

A. Something over \$20,000.

Mr. FOREST.—Q. Were the goods inventoried immediately prior to the sale? A. Yes, sir.

Q. By whom?

A. By myself and other parties working for the Arizona Hardware and Vehicle Company. I was in the employ of the Arizona Hardware and Vehicle Company at the time. There were four or five people engaged in taking the inventory.

Q. Now, Mr. Long, did you not make a proposition [56] yourself to the Arizona Hardware and Vehicle Company—is that the name of that concern?

A. Yes, sir.

Q. Did you not make a proposition to them in writing, whereby you agreed to pay to them the sum of fifty-five per cent of the invoice price of the goods and \$1,500 for the fixtures, and is it not true that they accepted your proposition?

A. That is true; but in addition to the \$1,500 for fixtures, there was two or three items of tools, and so forth—aside from the fixtures.

(Testimony of J. B. Long.)

Q. I mean for the stock of goods of the Arizona Hardware and Vehicle Company—the stock of goods itself. A. That is—

Q. You made a proposition of fifty-five cents on the invoice price? A. Yes, sir.

Q. In addition to that, you offered them \$1,500 for the fixtures? A. Yes, sir.

Q. And they accepted your proposition?

A. Yes; but they did not include all of the stock. I say, there were items of tools that were not included either in the stock or in the fixtures.

Q. To whom did they belong?

A. Arizona Hardware and Vehicle Company.

Q. Were they afterwards taken over?

A. They were taken over at the same time. [57]

Q. How much were they?

A. I don't remember, but between \$200 and \$300 is my recollection.

Q. Now, you say it was \$200 or \$300. If you paid them, then, fifty-five per cent and they accepted it for the stock of goods, and \$1,500 for the fixtures, that would aggregate, would it not, an invoice of \$17,000 including the stock of goods, fixtures and all?

A. No, sir.

Q. Examine this instrument I hand you, dated Phoenix, March 15th, 1907. Is that the proposition you made to the company? You may state, Mr. Long, if that is the form of the proposition you made to the company.

A. That is the form of the proposition we made.

Q. And is this the receipt?

(Testimony of J. B. Long.)

A. Received of J. B. Long \$1,500.

Q. For the payment of what?

A. On the contract—to apply on the contract.

Mr. FOREST.—We offer this in evidence, if the court please.

Mr. JENCKES.—We have no objection to that.

Mr. FOREST.—I ask that it be filed as Trustee's Exhibit No. 4.

The REFEREE.—You want to get in the record what that is?

Mr. FOREST.—Trustee's Exhibit No. 4 is the proposition of Mr. Long to the Arizona Hardware and Vehicle Company, and receipt for the payment of \$1,500 on the contract. [58]

(Proposition of J. B. Long to the Arizona Hardware and Vehicle Company, dated March 15th, 1907, was received in evidence by the Referee and marked "Trustee's Exhibit No. 4.")

Recross-examination by Mr. JENCKES.

Q. Mr. Long, did you pay the Arizona Hardware and Vehicle Company ten thousand dollars for that stock?

A. Approximately. I got a few dollars less than \$10,000.

Q. Do you know how many dollars less?

A. Less than \$50, less than that—paid them over \$9,950, as I recollect.

Q. Regardless of this contract—whatever that may figure out—the actual money which you paid to the Arizona Hardware and Vehicle Company for that stock of fixtures and merchandise was some-

(Testimony of J. B. Long.)

thing over \$9,950? A. That is my recollection.

Q. In cash? A. Within \$5 or \$10.

Q. Not less than \$9,950? A. Not less than that.

Mr. JENCKES.—That is all.

(The witness was then excused.)

Testimony of Charles Christy, for the Trustee.

CHARLES CHRISTY, being called as a witness and first duly sworn, testified as follows:

Direct Examination by Mr. FOREST.

Q. What is your name?

A. Charles Christy. [59]

Q. Charles B.? A. Charles Bennet Christy.

Q. What official position do you hold with reference to the Phoenix Hardware Company, bankrupt?

A. I am trustee.

Q. And have been since your first appointment?

A. Since my appointment, last fall.

Mr. FOREST.—I will state to the Court, now, in order to shorten up the record, that Mr. Jenckes and I have stipulated that the bills here, or rather the claims which have been presented and allowed before his Honor, the Referee, against the Phoenix Hardware Company, bankrupt, may be introduced in evidence as a whole—in order to save a long record by introducing each separate bill, and the bills may be marked—

Mr. JENCKES.—I would suggest that we stipulate that they be considered in evidence without being actually marked. They are in the possession of the Referee, and will go up when the whole thing goes up.

(Testimony of Charles Christy.)

Mr. KINGSBURY.—You can add to the statement that it is stipulated in open court that the bills amount to so much.

Mr. FOREST.—The stenographer might take this, if it is agreeable to Mr. Jenckes: It is also stipulated by the respondents and the trustee through their respective counsel that the amount of the claims that have been presented and allowed by the Referee against the Phoenix Hardware Company, bankrupt, aggregate the sum of \$5,835.44.

Mr. JENCKES.—I assume that that is the amount of [60] the claims. . . . If the Referee and Mr. Christy know whether they are the claims—

A. Those are the claims.

Mr. FOREST.—Now, may I ask the stenographer to read the last stipulation?

(Stipulation read.)

Mr. FOREST.—And add to that: And that no part thereof has been paid.

Q. Now, Mr. Christy, when did this estate come into your hands as trustee, approximately?

A. The latter part of November, if I am not mistaken.

Q. Nineteen what? A. 1914.

Q. From whom did you receive it?

A. J. D. McCoy, who was receiver under the estate courts prior to my taking charge.

Q. How long had Mr. McCoy handled the estate prior to the time you took it?

A. I am not exactly familiar with them. The affairs of the company were thrown into state receiver-

(Testimony of Charles Christy.)

ship about the latter part of August.

Q. 1914? A. 1914.

Q. Now, Mr. Christy, did you find any unpaid bills due the company from outside sources?

A. Among the assets turned over to me were a list of accounts, due and payable, from which a number had been collected by the state receivership. [61]

Q. And when he turned the matter over to you, did he account for what he had collected?

A. He turned over his books, which accounted for such payments as had been made by the people owing; and he also accounted for all sales he had made from the stock during his management by his cash book.

Q. Now, Mr. Christy, what, if anything, did you do towards making collections of unpaid bills due the bankrupt?

A. Why, I put them in the hands of a young fellow for collection last spring, after talking with the Referee regarding it and my authority to do so, and collected the \$200. And since that time I have taken the matter up with other people, making inquiries regarding the feasibility of collection, and their replies have been to the effect that the accounts were worthless.

Mr. KINGSBURY.—We object to that. Talks between somebody else and this trustee are immaterial.

Mr. FOREST.—Simply showing his attempt to collect.

The REFEREE.—I think it is admissible to show

(Testimony of Charles Christy.)

whether or not they are collectible—whether the trustee has made any attempt to collect.

Mr. FOREST.—Q. After having collected the \$200 that you mentioned, what, if anything, did the collector do with the balance of the bills?

A. He turned them back to me, saying that it was impossible to get anything out of them.

Q. Have you a list of those unpaid bills with you?

A. Yes, sir; I have the list that was turned over [62] by the court, and I have also a list—a copy that I have used, with my own notations.

Q. Now, the instrument that you have in your hands is what?

A. It is a list of the accounts receivable of the Phoenix Hardware Company, as rendered by the State receiver upon his inventory of the Phoenix Hardware Company.

Q. Are those the bills that you have tried to collect? A. They are, sir.

Q. What inquiries have you made, if any, concerning the possibility of collecting these claims?

A. I have made inquiry of local collectors, whom I considered to be best advised on the reliability of the people in question; and I have also made inquiry of tradesmen who handled the same line of commodity as the Phoenix Hardware Company.

Q. Did you submit a list of the debtors to these people? A. Yes.

Q. Since the collector turned the accounts back to you, have you been able to get anyone to collect anything more on the debts? A. No.

(Testimony of Charles Christy.)

Q. And you have collected no more, yourself?

A. No, sir.

Q. What would you say, then, as to the prospects of collecting any of these bills?

A. I would say that, as an asset, this list of [63] accounts receivable, is worthless.

Q. What is their condition with reference to the time which they have run?

A. All open accounts—you wish a statement under the bankruptcy law? All open accounts which have been out over three years become outlawed.

Q. How long a time has any of them run?

A. Of this list of accounts receivable, totalling \$3,921.35, I find by comparison with the books of the Phoenix Hardware Company that \$1,277.24 are outlawed.

Q. Wait a minute. You mean—

A. They ceased to be collectible on or before December, 1914.

Q. That is, they have been on the books—

A. They have been on the books for three years prior to December, 1914.

Q. And what else?

A. I found that of the balance remaining \$1,802.21 were considered uncollectible and worthless by other people. I also found that \$631.81 has been collected by myself and the receiver.

Q. Wait a minute.

A. I gave the totals. I am listing what each segregation amounts to, and you will find that they cover the whole list.

(Testimony of Charles Christy.)

Q. But the aggregate sum set out here as unpaid claims in the hands of the Referee amount to \$5,835.44. Is this \$600 that you have collected—
[64].

A. No; of this \$600 I am speaking of, \$431 was collected by the state receiver and turned over to me with the bank deposit when I became trustee; and the other \$200 I collected myself. There is a collection of \$8 or \$9 that I made myself aside from the \$200.

Q. And that is all accounted for?

A. Yes, sir; that has been reported before. Then, I would say, further, that the difference as shown by the figures presented, and the total accounts receivable, do not represent collectible accounts. They represent accounts of people of whom I could learn nothing—nobody knew anything. In other words, they were probably as worthless as those we knew.

Mr. JENCKES.—Q. How much is that?

A. It would be less than \$200.

Q. That you could find—

A. That I could find no trace of.

Mr. FOREST.—What did you say that is?

A. This is a list of the accounts receivable.

Q. An exact copy? A. A verbatim copy.

Q. And was it compared with the books of the company?

A. Yes, sir; it was compared by the people who made the transfer and by myself. I made this for the purpose of giving myself a check.

(Testimony of Charles Christy.)

Mr. JENCKES.—If Mr. Christy made it himself, we have no objection on that ground.

Mr. FOREST.—We offer it as Trustee's Exhibit No. 5. [65]

Q. Being what?

A. A transcript of the accounts receivable of the Phoenix Hardware Company, as itemized by the state receiver.

Mr. JENCKES.—We have no objection to the account itself, but these notations—it is understood that these are no part of the exhibit?

A. My testimony covers that.

Mr. FOREST.—We will offer it for the purpose stated, and that is all—not that the notations on there have anything to do with it.

Mr. KINGSBURY.—It looks to me like this ought to be re-copied. All those notations on there may be considered as struck out?

Mr. JENCKES.—Just let that be substituted.

(List of accounts receivable of Phoenix Hardware Company was received in evidence by the Referee and markd "Trustee's Exhibit No. 5.")

Mr. FOREST.—You may cross-examine.

The REFEREE.—Q. Mr. Christy, you say that certain moneys were turned over to you by the state receiver? A. Yes, sir.

Q. I wish you would state whether or not it is within your knowledge that the state receiver and his attorney were first compensated by the State court? A. They certainly were.

Q. Before turning any of the money over to you?

(Testimony of Charles Christy.)

A. Yes, sir; compensation for the State court and the State receiver, as well as his attorney were paid [66] from the funds after adjudication in bankruptcy, and before they were turned over to me, amounting close to \$200, as I remember.

Cross-examination by Mr. JENCKES.

Q. Mr. Christy, you were appointed trustee the latter part of November, 1914? A. Yes, sir.

Q. And qualified at the same time?

A. I believe I did at practically the same time. I believe it was about the 24th day of November. It was the latter part of November.

Q. You immediately took over these accounts at that time?

A. No; I was not given these things until after the inventory was taken of the stock.

Q. When did you first become cognizant of the fact that \$1,277.44 had become outlawed?

A. In glancing over the books—as shown by the Phoenix Hardware books—running over the accounts to see what looked practical in it. And when I took up with the party last spring, and he reported adversely, I took occasion to go over the books myself and investigate. It would seem to endorse his ideas so thoroughly that it was a verification of his.

Q. This \$1,277.44 all became outlawed during the time of your incumbency as trustee?

A. As a matter of fact, they became outlawed prior to that time. [67]

Q. I understood you to say that they were outlawed December, 1914? A. Yes, sir.

(Testimony of Charles Christy.)

Q. Then, you mean the rest outlawed in December, 1914?

A. December items of 1914 were not placed among the items that were outlawed—at least, December, 1911, were not included among those which were outlawed; but items of November, 1911, such as there were, included among those which became outlawed prior to my being able to take action.

Q. Then, none of this stuff has become outlawed since you have been trustee?

A. All items of 1912 would naturally revert to bankruptcy.

Q. What do you mean?

A. Items of 1912 up to the present time would be beyond collection, as outlawed.

Q. How much of this \$3,921.35 has become outlawed during your incumbency as trustee?

A. The items for 1912 and December, 1912, when taking into consideration the entire month of December, this year, are \$405.73.

Q. What is the reason that no effort was made to collect and enforce the collection of those by suit?

A. Because, as you will find from my former evidence, the majority of that amount is absolutely worthless according to the opinion of people whom I referred it to.

Q. Did you ever make any other investigation, except [68] what you obtained from collectors, or inquiry as to the property which these people might have?

(Testimony of Charles Christy.)

A. I inquired at the M. and M., and was told that they were worthless.

The REFEREE.—You say M. and M. You had better state what that is.

A. Merchants and Manufacturers' Association.

Mr. JENCKES.—Q. But you made no examination of the assessment-rolls or anything of that sort?

A. No, sir; I made no examination of the assessment-rolls.

Q. So, all the information you have about it is what you got from collection agencies?

A. Yes, sir; you might say it that way—from people who would be conversant with the standing of people in the community.

Q. Did you ever consult with any of the Longs as to the collectibility of the accounts?

A. None, whatever.

Q. Ever solicit their aid in the collection?

A. None, whatever.

Q. Was there any reason for not doing so?

A. No, except this, that I thought if they were not able to collect practically \$3,000 in two years' time, they could not do so in a few months' time.

Q. That was the only reason?

A. I thought, to be perfectly frank, that they had not demonstrated their ability as collectors for the Phoenix [69] Hardware Company. Why should they show any better ability collecting for me as trustee?

Q. That was the only reason?

A. That is the only reason.

(Testimony of Charles Christy.)

Q. What is the balance now? I did not gather from your statement on direct examination what remained uncollected at the present time outside of these outlawed accounts.

A. There would be practically the difference.

Q. That is a matter of computation, however.

A. Practically—I am considering the 1912 business as being out. I am not taking that into consideration as among the outlawed accounts.

Q. 1912?

A. There would be 1911, and deducting the outlawed accounts prior to my incumbency and collections made, there is a balance of \$2,000.

Q. \$2,000?

A. Practically—approximately, \$2,000—very close to it.

Q. None of this is outlawed as yet?

A. Yes; the item I gave you before—the sum of \$400.00 would be outlawed, too—whatever I gave you.

Q. \$405.73? A. Deducting \$400,—\$1,600.

Mr. JENCKES.—I think that is all.

Mr. FOREST.—That is all.

(The witness was then excused.) [70]

Testimony of Harry L. Shedd, for the Trustee.

HARRY L. SHEDD, being called as a witness and first duly sworn, testified as follows:

Direct Examination by Mr. FOREST.

Q. What is your name? A. Harry L. Shedd.

Q. Mr. Shedd, what business are you engaged in in Phoenix?

(Testimony of Harry L. Shedd.)

A. In mercantile service at the present time.

Q. Do you give your attention to collections?

A. Yes.

Q. That is really your business?

A. That is my main business.

Q. Collections? A. Yes, sir.

Q. Now, Mr. Shedd, it is a part of your business, in connection with your occupation, to inquire into the financial condition, and situation of people in this valley and city with reference to their financial condition? A. It is.

Q. And how long have you lived in Phoenix?

A. About six years.

Q. And state whether or not you are well acquainted with the financial situation of the people in this vicinity? A. I feel that I am; yes.

Q. Have become so because of your occupation?

A. By reason of my occupation and my connection with two of the banks in the city. [71]

Q. You have also been in two of the banks in the city? A. Yes, sir.

Q. And by reason of your experience in the banks, you were able to determine to a considerable extent the financial—

Mr. JENCKES.—That is leading.

Mr. FOREST.—Withdraw that.

Q. What, if any, information did you acquire as to the financial standing of people throughout this community because of your relations with banks?

A. Well, I was, of course associated with the banks in different capacities; and it put me in touch with

(Testimony of Harry L. Shedd.)

their business relations with each other in the city. Of course, I had access to their accounts at the banks and business dealings, one and another; and had occasion to examine into the standing at different times; and it gave me a very good understanding of their financial condition around.

Q. Now, Mr. Shedd, I hand you Trustee's Exhibit No. 5, and ask you if you have seen it before to-day?

A. Yes, sir.

Q. From whom did you receive it?

A. From Mr. Christy.

Q. Did you at that time make an examination of it?

A. I did.

Q. You may state to the court now, Mr. Shedd, if in your opinion the accounts and claims set forth in that instrument are collectible.

Mr. JENCKES.—Just a minute. We object to that, if your Honor please, first, upon the ground that it is not a [72] matter upon which Mr. Shedd has qualified to give an opinion by the mere fact of his having had some experience in the banks and in collecting other accounts; and, second, upon the ground that this is not a proper matter for such opinion evidence.

The REFEREE.—Let me ask Mr. Shedd.

Q. Mr. Shedd, for what purpose did Mr. Christy hand you that exhibit?

A. For what purpose?

Q. Yes.

A. He came over and asked me about—let me look at the list and examine it to see what I thought about

(Testimony of Harry L. Shedd.)

the possibility of collecting the accounts of these people who are listed in this exhibit.

Q. Are you acquainted or familiar with any of those accounts?

A. Yes, sir; these particular accounts.

Mr. FOREST.—Q. You mean the accounts or the men? A. I am with the men; yes.

The REFEREE.—Q. You are familiar and acquainted with some of the men? A. Yes, sir.

Q. How long have you been in the collection business, Mr. Shedd?

A. It has been three years the first of January, in Phoenix.

Q. Three years? A. Yes, sir. [73]

Q. Do you have any connection with the Merchants' and Manufacturers' Association?

A. I do, in a degree.

Q. Do you have access to their books?

A. In so far as a subscriber, I might say yes.

Q. Are you privileged when you get a list of accounts to peruse their records?

A. No more than any person who is a member of the association can inquire about some person. I do not have access to their books like themselves. I don't believe that I have ever been what you might say turned down. I have made inquiry about a man's standing, and they have given me information; and in return, I am very often questioned by them as to the standing of an individual.

Q. Did you, after perusing that list of debtors,

(Testimony of Harry L. Shedd.)

decline to accept or attempt to collect any of those accounts?

A. No, sir; they have never been offered to me for collection.

Q. What were they offered to you for?

A. I was asked concerning them, as I said before. I was asked concerning the standing of the people who were owing the accounts and whether they were collectible.

Mr. JENCKES.—We submit, if your Honor please, that the witness in this instance is asked to testify to the direct fact which is in issue here—as to whether in his opinion these accounts are collectible. Now, Mr. Forest is attempting to qualify him as an expert on collection matters. The only way an expert can testify on any question [74] in the case to embody it hypothetically.

The REFEREE.—Q. Mr. Shedd, are you personally acquainted with any of those debtors on that list?

A. Am I personally acquainted with them? Yes, sir.

Q. About what percentage?

A. I don't know that I could tell you. I have not gone over to check them out in that way, but I think—I would say that I feel that I am acquainted with the majority of them.

Q. Have you had any experience with those with whom you are acquainted in attempting to make collections? A. Yes, sir.

Q. Then, did you base your answer on your ex-

(Testimony of Harry L. Shedd.)

perience with those with whom you are acquainted?

A. Yes.

The REFEREE.—I think that is about as near as you can get. It is a hard proposition.

Mr. JENCKES.—If he knows of his personal knowledge, of course, he can testify.

The REFEREE.—It is part conclusion, of course. I think I will permit Mr. Shedd to testify.

(Question read by the reporter: "You may state to the Court now, Mr. Shedd, if in your opinion the accounts and claims set forth in that instrument are collectible.")

Mr. JENCKES.—We desire to note an exception to the ruling of the Referee.

A. There is a very small percentage of these accounts that is collectible; and those that you might consider [75] collectible at all, are such accounts that it would take a good deal of time and patience, and probably in most instances legal procedure in order to get them.

Q. Could you get them then?

A. No, sir—except to get a judgment.

Q. Take your chances in satisfying the judgment?

A. Yes, sir.

Mr. FOREST.—You may cross-examine the witness.

Cross-examination by Mr. JENCKES.

Q. Mrs. J. T. Barnum, \$8.15. What about Mrs. Barnum? Has she any property?

A. Mrs. Barnum, I think, is a party who a short

(Testimony of Harry L. Shedd.)

time ago lived in Paradise Valley, and to my knowledge has no property.

Q. To your knowledge? You know that she has no property?

A. I could not say that she has not any at the present time, Mr. Jenckes, because since I have known the party it is barely possible that she may have acquired some.

Q. So far as you know, she might have?

A. She might have at the present time.

Q. Have you made inquiry among the banks to ascertain whether she has any account in the banks?

A. I know that I had some experience with that particular person at one time. I had a \$10 bank note for collection, and unable to find anything at that time to realize on. I think she was a relative of some member of the bank force, if I remember rightly. [76]

Q. Here is O. Bane. What do you know about his inability to pay his account?

A. I think he is a man who is a painter and contractor by trade, and is a man that I have had a little experience with and up to this time I have never been able to get any money out of him. However, I have never brought suit against him.

Q. Here is R. L. Bailis. What do you know about his financial standing?

A. Mr. Bailis? I am not as well acquainted with him as some of the others, but such reports as I have heard are that he is very slow pay, and as to property, I could not say.

(Testimony of Harry L. Shedd.)

Q. You don't know whether he has any property?

A. I don't know whether he has any property now or not. In the course of the past two years, I have had something against that party, but I don't recall what. I know that I did not get any money out of him.

Q. As far as his account being uncollectible is concerned, all you know is what you have heard?

A. I have had an account within the past two years.

Q. How much was the account?

A. I don't know.

Q. Did you bring suit? A. No.

Q. As a matter of fact, have you brought suit against any of these and got execution?

A. I could not answer that offhand? [77]

Q. I thought you went over the list.

A. I did not go over it for that purpose. I could not say whether or not I filed suit, or who I filed suit against without going over the list.

Q. When you go over this list and say it is uncollectible, you merely make a long guess?

A. Either the experience of myself or those fixed to know.

Q. I wish you would take that list and look through it and see how many people you have brought suit against and taken out execution against.

A. I don't know that I could do that without referring to my records.

Q. Did you examine your records before?

A. I did not look for that purpose. I looked to

(Testimony of Harry L. Shedd.)

see if the accounts were collectible. Here is one man I brought suit against—Mr. Bradford—for house rent that he owed a poor old man in the eastern part of town. I am not sure about that. I got judgment, but not satisfied.

Q. Did you take out execution?

A. Never been able to find anything in his own name.

Q. Anybody else?

A. Mr. Boring. I have endeavored several different times to get money out of him. I have never brought suit against him. Mr. Boardman is a man I have had a little dealing with, and have got a little money out of; but it was only through money being placed in my hands for the purpose of suing him that I got that settlement. [78]

Q. You did get that, however? How much?

A. I could not recall that.

Q. About?

A. I could not recall offhand.

Q. As a matter of fact, Mr. Shedd, has not your experience been in this collection business that you do not get anything unless you bring suit?

A. No, sir; my general experience is that I have brought probably something over one hundred suits in the courts of Phoenix within the last one and a half or two years; and of those suits, I think four or five have probably been decided against me, or in favor of the defendant. In some of those cases—a great number—we still have judgments. In some cases they were settled upon judgment being ren-

(Testimony of Harry L. Shedd.)

dered. In others we have executions out now, trying to get property sufficient to satisfy.

Q. In your experience, what percentage of the cases where you do bring suit for collection do you collect after bringing suit?

A. I would say possibly seventy-five per cent—at least that—just approximately.

Q. What is your opinion about this particular list?

A. I was going to say, in connection with this, that the suits in a great many instances—that when they get notices from us to come to see us about the accounts they make propositions of payment rather than be sued, and know that we are after the money and make a fair settlement with us. [79]

Q. These accounts were never placed in your hands for collection?

A. These particular accounts? No, sir.

Mr. JENCKES.—That is all.

(The witness was then excused.)

Testimony of L. C. Taylor, for the Trustee.

L. C. TAYLOR, being called as a witness and first duly sworn, testified as follows:

Direct Examination by Mr. FOREST.

Q. What is your name? A. L. C. Taylor.

Q. What is your business, Mr. Taylor?

A. Wall paper, decorating, and so forth.

Q. You have a store? A. Yes, sir.

Q. Do you know King and Pobe?

A. I don't know Pobe. I know a man by the name of King.

Q. Is it the same one who is connected with Pobe?

(Testimony of L. C. Taylor.)

A. I don't know.

Q. What is his occupation—this King?

A. He is a painter.

Q. Is he still here in the country? A. Yes.

Q. Are you acquainted with his financial standing?

A. Not particularly. I know what he works at, generally.

Q. What would you say as to the collectibility of [80] an account against him for \$103?

A. Personally, I don't think very much of it.

Q. Has he got property so that such an account is collectible? A. Not to my knowledge.

Q. And Allison Burg—do you know him?

A. No.

Q. A. Bane—do you know him? A. Yes.

Q. What is his occupation?

A. He is a painter.

Q. What would you say with reference to the collectibility of a claim against him for \$241.60?

Mr. JENCKES.—We desire to object to Mr. Taylor's testifying as to the collectibility of these accounts upon the same ground that we objected to the evidence of Mr. Shedd—that it is not the proper ground for opinion evidence to be given, and, further, that Mr. Taylor has not qualified.

The REFEREE.—I will sustain the objection.

Mr. FOREST.—Q. You say you are acquainted with Mr. Bane? A. Yes.

Q. Know him quite well?

A. Well, no; I would not say that I know him quite well.

(Testimony of L. C. Taylor.)

Q. Have you ever had any business relations with him? A. No; not to my knowledge. [81]

Q. You, being in the paint business, have you had occasion to inquire into his financial responsibility?

A. More from hearsay than personal.

Q. Have you had occasion to inquire into his financial responsibility? A. Yes.

Q. And also to inquire into his disposition for paying bills? A. Yes.

Q. Then, from the inquiries that you have made, you are familiar as to his reputation, then, for being able and willing or not able to pay his bills?

Mr. JENCKES.—We object to that.

Mr. FOREST.—I think that is quite competent.

Mr. JENCKES.—The question as to whether he has a reputation for paying his bills has nothing to do with the collectibility of the account. The question is: Are these accounts collectible?

The REFEREE.—Sustain the objection.

Mr. FOREST.—Q. Has he any property?

A. Not to my knowledge. I have understood that he had property in his wife's name.

Mr. FOREST.—It is the ruling of the Court that he cannot testify to any of these accounts?

The REFEREE.—Unless he is familiar or got his information from a proper source. A man may have a reputation by hearsay of being a poor payer, but he may be able to pay.

Mr. FOREST.—Q. J. J. Mitchell—are you acquainted [82] with him? A. No.

Q. T. H. Wilson?

(Testimony of L. C. Taylor.)

A. I knew him when he was here.

Q. What has become of Wilson?

A. I really don't know.

Q. Is he still here? A. No.

Q. Left the country? A. Yes.

Q. Leave any property here?

A. Not to my knowledge.

Q. Do you know T. N. Walls? A. No.

Mr. FOREST.—That is all.

Cross-examination by Mr. JENCKES.

Q. As far as Mr. Bane is concerned, you have heard that he has property in his wife's name?

A. Yes.

Q. You don't know whether it is her separate property or community property? A. No.

Mr. JENCKES.—That is all.

(The witness was then excused.)

Mr. FOREST.—The trustee rests.

Mr. JENCKES.—Now, on behalf of the respondents, we move that the petition of the trustee for an order levying [83] an assessment upon the unpaid subscriptions to stock be dismissed upon the ground that there is no evidence introduced on behalf of the trustee to show that there was in the first place any subscriptions at all to the stock, and upon the further ground that the evidence disclosed by the trustee himself shows that the stock in the company was acquired by the respondents by a transfer to the company of a stock of merchandise, the valuation of which is shown by their own evidence to be \$20,000.

(Testimony of J. B. Long.)

Those are the grounds of the motion, and in support of the motion I would ask leave to submit authorities showing my contention to be correct. . . .

Testimony of J. B. Long, for the Trustee (Recalled).

J. B. LONG, being recalled as a witness and having been theretofore duly sworn, testified as follows:

Examination by the REFEREE.

Q. I want to ask you, Mr. Long, if either you or any of the other stockholders ever put in any additional cash or anything else to represent the stock that you received? A. No, sir.

Q. So, then, the stock which was issued—all the stock was simply, solely and only for these goods and fixtures which were transferred by you and Mrs. M. West?

A. Yes, sir; the deal was considered closed. There is no stock left in the treasury. It was all issued in payment for the goods that the company received.

(The witness was then excused.) [84]

THEREUPON it was agreed that the hearing should stand adjourned while the parties submitted briefs. [85]

*In the District Court of the United States for the
District of Arizona.*

Before FRED A. LARSON, Esq., Referee in
Bankruptcy.

In the Matter of PHOENIX HARDWARE COM-
PANY, a Corporation, Bankrupt.

State of Arizona,

County of Maricopa,—ss.

I HEREBY CERTIFY that I was appointed official reporter and duly sworn truly and correctly to take down in shorthand and transcribe into long-hand the testimony given and proceedings had at the hearing on the 14th day of December, 1915, at Phoenix, Arizona, before Fred A. Larson, Esq., Referee in Bankruptcy, in the above-entitled matter; that I was present and so took down in shorthand all the testimony given and proceedings had; that the said shorthand notes, so taken, were full, true and correct of all oral testimony adduced at said hearing, including questions propounded to witnesses on the stand and their answers thereto, and all objections, stipulations, concessions and requests of counsel, as well as the rulings, orders and remarks of the Referee in Bankruptcy; and that the foregoing typewritten sheets, numbered 1 to 63, inclusive, comprise a full, true and correct transcript of said shorthand notes, all done according to the best of my skill and ability.

Dated at Phoenix, Arizona, the 26th day of March, 1916.

RAYMOND ALLEE,
Reporter. [86]

[Endorsements]: M. 46. In the District Court of the United States for the District of Arizona. Before Fred A. Larson, Esq., Referee in Bankruptcy. In the Matter of Phoenix Hardware Company, a Corporation, Bankrupt. Reporter's Transcript of Testimony and Proceedings Before Fred A. Larson, Esq., Referee in Bankruptcy, Phoenix, Maricopa County, State of Arizona, December 14, 1915. Raymond Allee, Stenographer, Phoenix, Arizona. Filed April 4, 1916. Fred A. Larson, Referee. [87]

**Trustee's Exhibit No. 1—Certified Copy of Articles
of Incorporation of Phoenix Hardware Co.**

STATE OF ARIZONA

Office of the

ARIZONA CORPORATION COMMISSION.

United States of America,

State of Arizona,—ss.

The ARIZONA CORPORATION COMMISSION does hereby certify that the annexed is a true and complete transcript of the

ARTICLES OF INCORPORATION

of

“PHOENIX HARDWARE COMPANY,”

which were filed in the office of the Auditor of Arizona on the 19th day of March, A. D. 1907, at 2:00 o'clock P. M., as provided by law.

IN TESTIMONY WHEREOF, The Arizona Corporation Commission, by its Chairman, has hereunto set its hand and affixed its Official Seal. Done at the city of Phoenix, the Capitol, this 1st day of April, A. D. 1915.

ARIZONA CORPORATION COMMISSION,
F. A. JONES,
Chairman.

[Seal]

F. L. BANTA,
Acting Secretary.

(Revenue Stamp) [88]

ARTICLES OF INCORPORATION
of the

PHOENIX HARDWARE COMPANY.

KNOW ALL MEN BY THESE PRESENTS: That we, J. B. Long and J. W. Long, of Maricopa County, Arizona, desiring to incorporate ourselves and become incorporated under the provisions of the laws of the Territory of Arizona, for the purpose of engaging in the lawful enterprises, business and occupation hereinafter specified, to make, adopt, sign and acknowledge according to law these Articles of Incorporation.

ARTICLE I.

The names of the incorporators are J. B. LONG and J. W. LONG.

The name adopted by this corporation and by which it shall be known in all of its affairs is the "PHOENIX HARDWARE COMPANY," and its principal place of transacting business is and shall be the City of Phoenix, in the County and

Territory aforesaid, but it shall have the right to transact its business in such other place or places in said Territory as the Board of Directors may hereafter from time to time designate.

ARTICLE II.

The general nature of the business proposed to be transacted by this corporation and in which it is to engage is that of doing a general hardware and implement business, buying and selling of all kinds of merchandise and real and personal property of every kind and character and description; borrowing money and contracting to pay the same at such time or times and at [89] such rate of interest as its Board of Directors may deem advisable, and to secure the payment of the same by mortgage, pledge, or otherwise, on any or all of the property of the corporation; and to transact any and all kinds of business that may be transacted by a natural person.

ARTICLE III.

The amount of the capital stock authorized by this corporation is fifty thousand (\$50,000). It shall be divided into five hundred (500) shares and the par value of each share shall be one hundred dollars (\$100). The times when and the conditions upon which it shall be paid are as follows: The whole thereof within thirty (30) days after the same has been subscribed for, provided that the Board of Directors of said Company may accept merchantable hardware at such prices as they may deem proper in part or full payment for any subscription to the stock of this corporation.

ARTICLE IV.

The time of the commencement of this corporation shall be the 19th day of March, 1907, and it shall endure for a period of twenty-five (25) years thereafter. And said corporation shall commence the transaction of the business for which it is incorporated as soon as ten per cent of the capital stock has been subscribed for.

ARTICLE V.

The affairs of this corporation shall be conducted by a Board of Directors consisting of three stockholders who shall be elected annually by the stockholders from among their number [90] at the annual election thereof to be held in the office of the company at Phoenix, Arizona, on the first Tuesday in November in each year hereafter at the hour of ten o'clock A. M., and until the first annual meeting of said stockholders, the following named persons who are subscribers to the capital stock of this corporation shall constitute the Board of Directors, namely J. B. LONG, J. W. LONG and WEST.

ARTICLE VI.

The officers of this corporation shall be a President, Secretary and Treasurer, and such other officers as may be provided for by the by-laws. The president shall be elected by the Board of Directors from among their number annually immediately after the annual meeting of the stockholders. The other officers shall be elected by the Board at such time and place as they shall designate, but such other officers need not be members of the Board of Directors.

The Directors and officers of this corporation shall hold their respective offices for one year from the date of their election and until their successors are elected and qualified unless such director or officer shall cease to be a stockholder in the corporation, and in any such case such director or officer shall cease to be a director or officer in the corporation from the date he ceases to be a stockholder therein; provided that all officers who are appointed by the Board may be removed by them at their pleasure.

All vacancies in the Board of Directors or officers of this corporation shall be filled for the remainder of the term by the remaining members of the Board of Directors. [91]

ARTICLE VII.

The Board of Directors of this corporation shall have the power to establish by-laws and make all rules and regulations deemed advisable for the management of the affairs of this corporation and its officers not inconsistent with law. The majority of such Directors shall constitute a quorum.

ARTICLE VIII.

The highest amount of indebtedness or liability, direct or contingent to which this corporation is at any time to be subject or subject itself is thirty-two thousand dollars (\$32,000).

ARTICLE IX.

The stockholders of this corporation and their private property shall be exempt from the corporate debts of this corporation.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this 19th day of March, 1907.

J. B. LONG,

J. W. LONG. [92]

Territory of Arizona,
County of Maricopa,—ss.

Before me, W. J. Kingsbury, a Notary Public in and for the County of Maricopa, Territory of Arizona, on this day personally appeared J. B. Long, and J. W. Long, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

GIVEN under my hand and seal of office this 19th day of March, A. D. 1907.

[Notarial Seal]

W. J. KINGSBURY,

Notary Public.

My Commission expires April 21, 1908. [93]

Territory of Arizona,
County of Maricopa,—ss.

I, C. F. Leonard, County Recorder in and for the County and Territory aforesaid, hereby certify that I have compared the foregoing copy with the original Articles of Incorporation of the "Phoenix Hardware Company" filed and recorded in my office on the 19th day of March, 1907, in Book No. — of Incorporations, at page —, and that the same is a full, true and correct copy of such original and of the whole thereof.

WITNESS my hand and seal of office this 19th day of March, 1907.

[Seal]

C. F. LEONARD,
County Recorder.
By V. L. Vaughn,
Deputy. [94]

Filed in the office of the Territorial Auditor of the Territory of Arizona this 19 day of March, A. D. 1907, at 2:00 P. M., at request of Phoenix Hardware Company, whose postoffice address is Phoenix, Arizona.

JOHN H. PAGE,
Territorial Auditor. [95]

Trustee's Exhibit No. 1. M. A. Raymond Allee,
Reporter. December 14, 1915. [96]

**Trustee's Exhibit No. 2—Minutes of Meeting of
Board of Directors of Phoenix Hardware Co.,
March 19, 1907.**

Minutes of the first meeting of the Board of Directors of the PHOENIX HARDWARE COMPANY held at the office of the Company at Phoenix, Arizona, March 19, 1907.

On motion, J. B. Long was elected Chairman of the meeting. He announced that the Articles of Incorporation had been filed with the County Recorder and Territorial Auditor, and that it was proper for the directors to proceed to organize, all the directors being present.

On motion, the order of business was made the election of a President, Secretary and Treasurer.

On motion, J. B. Long was elected President of the Company.

On motion, J. W. Long was elected Secretary and Treasurer of the Company.

On motion, W. J. Kingsbury was appointed statutory agent for the Company by the following resolution:—

“RESOLVED, That W. J. Kingsbury, a bona fide resident of Tempe, in the Territory of Arizona, and who has been a resident of the said Territory for more than three years next preceding the date hereof, be, and he hereby is, appointed the agent of the PHOENIX HARDWARE COMPANY, upon whom all notices and processes, including service of summons, may be served and when so served, shall be deemed, taken and held to be lawful personal service upon this corporation.

The Secretary of this corporation is hereby directed to file a copy of this Resolution in the office of the Auditor of the Territory of Arizona.”

On motion, it was ordered that the Treasurer carry the Company's account in the Phoenix National Bank and that all funds deposited by the Company for its account should be drawn out by checks taken from the Company's regular check-book and signed by [97] the President, and a complete stub record kept of all checks issued.

On motion, W. J. Kingsbury was requested to get up a set of by-laws for the Company.

On motion, the meeting was adjourned.

J. W. LONG,
Secretary.

Attest: J. B. LONG.

President. [98]

Trustee's Exhibit No. 2 Raymond Allee. M. B.
December 14, 1915.

Trustee's Exhibit No. "1." J. M. Bloomfield, Jan.
26, 1915. Reporter. [99]

**Offer, March 5, 1907, Long to Arizona Hardware &
Vehicle Co.**

Phoenix, Ariz., March 5, 1907.

Mess Arizona Hardware And Vehicle Co.

Mr. Fred Epstein, General Manager.

Gentlemen:—

I desire to purchase the stock and fixtures of The
Arizona Hardware And Vehicle Co. for the Phoenix
Hardware Co. And make you the following offer,

For the stock of merchandise I will pay you Fifty-
five (55) cents on the dollar, at net cost price in the
store,

For all the store fixtures, the lump sum of Fifteen
hundred (1500) Dollars net.

Terms cash on completion of the inventory.

Consigned goods not included in this offer,

Yours Very Truly,

The above bid for Mdse. Stock of fixtures are ac-
cepted.

ARIZONA HARDWARE AND VEHICLE
CO.,

By FRED EPSTEIN,
Col. Mgr.

Mch. 9-07. [100]

**Trustee's Exhibit No. 4—Receipt March 9, 1907,
Arizona Hardware & Vehicle Co. to Long.**

Phoenix Ariz. Mch. 9-07.

Received from J. B. Long the sum of Fifteen hundred Dollars (1500.00) on account of within Contract.

ARIZONA HARDWARE AND VEHICLE
CO.,

FRED EPSTEIN, Gen. Mrg.

Trustee's Exhibit No. 4. Raymond Allee, Reporter. December 14, 1915. [101]

*In the District Court of the United States for the
District of Arizona.*

In the Matter of PHOENIX HARDWARE COMPANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Petition for Review.

Come now J. B. Long, J. W. Long, Margaret M. Long and M. West, by W. J. Kingsbury and Struckmeyer and Jenckes, their counsel, and file herewith their petition for review of the order of the Referee entered herein on the 15th day of March, 1916, and says that said Referee erred in ordering and adjudging as insufficient their response to the rule filed herein on November 3, 1915; that said Referee erred in

adjudging that respondents subscribed and did not fully pay for the number of shares of stock of said bankrupt corporation as set forth in said order, to wit, the said J. B. Long, 130 shares thereof, J. W. Long, 80 shares thereof, Margaret M. Long, 40 shares thereof, and M. West, 250 shares thereof, and further decreeing that respondents are liable in the sum of 33% of the par value of said stock less the amounts as found in said decree to have been paid thereon, to wit: The said J. B. Long in the sum of One Thousand Six Hundred and Ninety Dollars (\$1,690), the said J. W. Long in the sum of One Thousand Forty Dollars (\$1,040), the said Margaret M. Long in the sum of Five Hundred and Twenty Dollars (520), and the said M. West in the sum of Three Thousand Two Hundred and Fifty Dollars (\$3,250), and ordering the payment thereof to be made on or before the 5th day of April, 1916; that the said Referee [102] erred in adjudging that the book accounts remaining in the hands of the trustee as assets of said estate are not collectible; that the said Referee erred in adjudging that the original and only subscribers to the stock of said bankrupt corporation are the respondents, J. B. Long, J. W. Long, Margaret M. Long and M. West; that the said Referee erred in adjudging that each of respondents have paid upon said subscriptions at the rate of 20% of their par value or Twenty Dollars (\$20) per share, and that there remains unpaid on each and all of said subscriptions 80% of their par value or Eighty Dollars (\$80) per share; that the said Referee erred in adjudging that respondents

paid for the entire capital stock of said bankrupt corporation the sum of Ten Thousand Dollars (\$10,000), and that with said sum the said bankrupt corporation purchased a stock of goods from the Arizona Hardware and Vehicle Company and paid therefor the sum of Ten Thousand Dollars (\$10,000); that the said Referee erred in adjudging that by agreement made at the time respondents subscribed to the capital stock of the bankrupt corporation, respondents, by agreement, were credited with the unpaid balance of the par value of their said subscriptions, by discount, and the stock account between said bankrupt corporation and respondents balanced thereby; that said Referee erred in adjudging that the facts set forth in said order of said Referee were in effect a representation to the public by the officers, managers and agents of said bankrupt corporation; that all its capital stock had been subscribed for and had been paid in full; that said order so entered by the said Referee is void for the reason that the petition upon which said order is based does not state facts sufficient to authorize this Court to levy an assessment upon the capital stock of said bankrupt corporation belonging to respondents, and further on [103] the ground that the petition upon which said order is based on its face shows that the assessment upon the capital stock of said bankrupt corporation owned by respondents is barred by the statute of limitations of the State of Arizona, to wit, paragraphs 711 and 714, Revised Statutes of Arizona, 1913; that said Referee erred in entering said order on the 15th day of March, 1916, a copy of which is

filed herewith, that said order is erroneous and void and said Referee had no jurisdiction to enter same.

WHEREFORE, the said J. B. Long, J. W. Long, Margaret M. Long and M. West pray that said order entered herein by the Referee on March 15, 1916, be reviewed by the Honorable Judge of the District Court of the United States for the District of Arizona, and that said order be adjudged erroneous and void.

W. J. KINGSBURY,
STRUCKMEYER & JENCKES,
Attorneys for Respondents. [104]

*In the District Court of the United States for the
District of Arizona.*

In the Matter of PHOENIX HARDWARE COM-
PANY,

Bankrupt,

**Findings of Fact and Order Directing Trustee to
Make an Assessment on Each Share of Stock.**

This matter is before the referee upon petition of trustee for an order to show cause why M. West, J. B. Long, J. W. Long and Margaret M. Long should not be assessed on each share of stock of the Phoenix Hardware Company, subscribed to by them, at the rate of 24% on the par value thereof.

An answer was filed on behalf of each and all of said respondents which (after demurring to the petition on the grounds that it did not state facts sufficient to authorize the Court to levy an assessment upon the capital stock of said Phoenix Hardware

Company, belonging to respondents; and upon the further ground that the proposed assessment is barred by the statute of limitation of the State of Arizona) alleges in substance:

That they acquire the shares of capital stock of said Phoenix Hardware Company, owned by each of them by the sale of said Phoenix Hardware Company of a certain stock of merchandise of the value of \$20,000.00; that respondents did not subscribe for their capital stock at all, but they do not deny that they own the number of shares of stock hereinafter stated.

The said respondents by their answer deny that either as officers of said company or otherwise obtained credit from anyone for goods, wares and merchandise or money sold or advanced to said Phoenix Hardware Company upon any representation or statement that the said Phoenix Hardware Company had a capital stock of \$50,000 fully paid up.

The referee, after an argument by the attorneys for the respective parties, overruled the demurrer and thereafter, to wit, on the [105] 14th day of December, 1915, a hearing was had before this court, J. C. Forest appearing for the trustee and Struckmeyer & Jenckes and W. J. Kingsbury appearing for the respondents.

Testimony, both oral and documentary, was introduced on behalf of the trustee and the respondents, and the matter having been submitted to the Court for its consideration and decision, and after due deliberation thereon, Court finds the following facts and enters the order in accordance therewith:

FINDINGS OF FACT.

The Phoenix Hardware Company, bankrupt, was organized under the laws of the Territory, now State, of Arizona, during the month of March, 1907, with a capital stock of \$50,000, divided into 500 shares of the par value of \$100 each.

The said company was adjudicated bankrupt on the 24th day of October, 1914, and on the 20th day of November, 1914, Charles B. Christy became and now is the duly elected, qualified and acting trustee of the bankrupt's estate.

The total amount of claims filed, allowed and remaining unpaid against the said estate, amounts to the sum of \$5,835 and the statutory time for filing claims has long since expired.

The referee estimates that the necessary costs, disbursements, commissions, and counsel fees in connection with this matter would be \$665.

At the time of the hearing the trustee had in his hands a balance of funds applicable to the payment of these claims amounting to the sum of \$377.94, said balance being also subject to the payment of costs, disbursements, commissions, and counsel fees.

The only remaining assets of this estate are certain book accounts, which are not collectable, and unpaid subscriptions to the stock of said bankrupt.

The original and only subscribers to the stock of said company, and the amount subscribed for by each, on the 19th day of March, 1907, are the following: [106]

M. West	250 shares
J. B. Long.....	130 shares
J. W. Long.....	80 shares
Margaret M. Long.....	40 shares

That each of said subscribers have paid on said subscription at the rate of 20% of their par value or \$20.00 per share, and there remains unpaid on each and all of said subscription 80% of their par value or \$80 per share.

The referee further finds that the said subscribers paid for the entire capital stock of said company the sum of \$10,000 and with said sum the said Phoenix Hardware Company, by and through its duly authorized officers and agents, purchased a stock of goods from the Arizona Hardware & Vehicle Company and paid therefor the sum of \$10,000.

That no part of the 80% of the par value of said stock or \$80 per share has ever been paid into the treasury of the said Phoenix Hardware Company, bankrupt, by said subscribers or any or either of them or by anyone for them, but by agreement made at the day of the subscriptions the amounts paid thereon by each of said subscribers were credited to each of said subscribers and the balance unpaid or the par value thereof was, in effect, credited by discount and the stock account between, the said bankrupt corporation and said subscribers was balanced by such discount. That the facts herein set forth was in effect a representation to the public by the officers, managers and agents of said corporation, bankrupt, that all its capital stock had been subscribed for, and had been paid in full.

That at the time of the organization of said company, its articles of incorporation designated J. B. Long, J. W. Long and M. West the Board of Directors of said corporation and that ever since the said date they have continued to be and now are the Board of Directors of said corporation, bankrupt.

That on the 19th day of March, 1907, the said Board of Directors elected the following named persons as the officers of said corporation, to wit:

J. B. Long.....President

J. W. Long.....Secretary-Treasury [107]

and W. J. Kingsbury was appointed the legal agent of said corporation, and that said last named parties are still the duly elected qualified and acting officers of said corporation bankrupt.

The referee further finds that said subscribers for the stock of said company are liable to the trustee of said bankrupt estate for the unpaid amounts on such *subscriptions* or so much thereof as may be necessary to pay the debts of the bankrupt estate, and that an assessment of 33% upon the par value of each share of stock of said Phoenix Hardware Company, bankrupt, owned by each of said subscribers if credited with the amount heretofore paid thereon by each of said stockholders would equalize the burden upon the said stockholders and also bring into the hands of the trustee of said estate a sufficient amount to pay the debts of the said bankrupt estate and the necessary costs, disbursements, expenses, and counsel fees in the prosecution of this proceeding.

ORDER.

And now, to wit, this 15th day of March, 1916, on the petition of Charles B. Christy, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 3, 1915, signed by Fred A. Larson, referee in bankruptcy, why M. West, J. B. Long, J. W. Long and Margaret M. Long should not be assessed at the rate of 34% of the par value on each share of stock of the said bankrupt company, subscribed to by *the*, and it appearing that due service of said order to show cause has been made on the said M. West and that she has subscribed and not fully paid for 250 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing J. C. Forest for the petitioner and J. S. Jenckes in opposition, and after due deliberation had,—

It is ordered and decreed that M. West is liable in the sum of 33% of the par value of 250 shares of the stock of said Phoenix Hardware Company subscribed for by her, less \$5,000 paid thereon, or in the sum of \$3,250, on her said subscription, to the trustee [108] of the estate of said Phoenix Hardware Company, in said sum, and that she make payment thereof to Charles B. Christy, trustee, in bankruptcy of Phoenix Hardware Company, bankrupt, at Phoenix, Arizona within 20 days from the date of this order, and on or before the 5th day of April, 1916, said subscription when paid and collected to become a part of the assets of the said bankrupt estate, and to be accounted for and disbursed under the orders of this court.

In default of such payment Chas. B. Christy, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said M. West as are necessary to recover the said sum due by her on said stock either at law or equity.

Referee.

ORDER.

And now, to wit, this 15th day of March, 1916, on the petition of Charles B. Christy, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 3d, 1915, signed by Fred A. Larson, referee in bankruptcy, why M. West, J. B. Long, J. W. Long and Margaret M. Long should not be assessed at the rate of 34% of the par value on each share of stock of the said bankrupt company, subscribed to by them, and it appearing that due service of said order to show cause has been made on the said J. B. Long, and that he has subscribed and not fully paid for 130 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing J. C. Forest for the petitioner and J. S. Jenckes in opposition, and after due deliberation had,—

It is ordered and decreed that J. B. Long is liable in the sum of 33% of the par value of 130 shares of the stock of said Phoenix Hardware Company, subscribed for by him, less \$2,600 paid thereon, or in the sum of \$1,690, on his said subscription, to the trustee of the estate of said Phoenix Hardware Com-

pany in said sum, and [109] that he make payment thereof to Charles B. Christy, trustee in bankruptcy of Phoenix Hardware Company, bankrupt, at Phoenix, Arizona, within 20 days from the date of this order, and on or before the 5th day of April, 1916, said subscription when paid and collected to become a part of the assets of the said bankrupt estate, and to be accounted for and disbursed under the orders of this Court. In default of such payment Chas. B. Christy, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said J. B. Long as are necessary to recover the said sum due by him on said stock either at law or in equity.

Referee.

ORDER.

And now, to wit, this 15th day of March, 1916, on the petition of Charles B. Christy, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 34e, 1915, signed by Fred A. Larson, referee in bankruptcy, why M. West, J. B. Long, J. W. Long and Margaret M. Long should not be assessed at the rate of 34% of the par value on each share of stock of the said bankrupt company, subscribed to by them, and it appearing that due service of said order to show cause has been made on the said J. W. Long, and that he has subscribed and not fully paid for 80 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing J. C. Forest for the petitioner and J. S.

Jenckes in opposition, and after due deliberation had,—

It is ordered and decreed that J. W. Long is liable in the sum of 33% of the par value of 80 shares of the stock of said Phoenix Hardware Company subscribed for by him, less \$1,600, paid thereon, or in the sum of \$1,050, on his said subscription, to the trustee of the estate of said Phoenix Hardware Company in said sum, and that he make payment thereto to Charles B. Christy, trustee in [110] bankruptcy of Phoenix Hardware Company, bankrupt, at Phoenix, Arizona, within 20 days from the date of this order, and on or before the 5th day of April, 1916, said subscription, when paid and collected, to become a part of the assets of the said bankrupt estate, and to be accounted for and disbursed under the orders of this court.

In default of such payment Chas. B. Christy, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said J. W. Long as are necessary to recover the said sum due by him on said stock either by law or in equity.

Referee.

ORDER.

And now, to wit, this 15th day of March 1916, on the petition of Charles B. Christy, the trustee in bankruptcy of the estate of said bankrupt, and on the order to show cause dated November 3d, 1915, signed by Fred A. Larson, referee in bankruptcy, why M. West, J. B. Long, J. W. Long and Margaret

M. Long should not be assessed at the rate of 34% of the par value on each share of stock of the said bankrupt company, subscribed to by them, and it appearing that due service of said order to show cause has been made on the said Margaret M. Long, and that she has subscribed and not fully paid for 40 shares of stock of said bankrupt, and an answer having been filed and testimony having been taken, and after hearing J. C. Forest for the petitioner and J. S. Jenckes in opposition, and after due deliberation had,—

It is ordered and decreed that Margaret M. Long is liable in the sum of 33% of the par value of 40 shares of the stock of said Phoenix Hardware Company subscribed for by her, less \$800 paid thereon, or in the sum of \$520 on her said subscription, to the trustee of the estate of said Phoenix Hardware Company in said sum, and that she make payment thereof to Charles B. Christy, trustee in [111] bankruptcy of Phoenix Hardware Company, bankrupt, at Phoenix, Arizona, within 20 days from the date of this order, and on or before the 5th day of April, 1916, said subscription when paid and collected to become a part of the assets of the said bankrupt estate, and to be accounted for and disbursed under the orders of this Court.

In default of such payment Chas. B. Christy, trustee of the estate of said bankrupt, is hereby authorized and directed to institute such proceedings against said J. W. Long as are necessary to recover

the said sum due by him on said stock either at law or in equity.

Referee. [112]

[Endorsements]: No. M. 45. In the United States District Court in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt, J. B. Long, J. W. Long, Margaret M. Long and M. West, Respondents. Petition for Review. Filed March 28, 1916. Fred A. Larson, Referee. [113]

In the District Court of the United States in and for the District of Arizona.

No. —.

In the Matter of PHOENIX HARDWARE COMPANY,

.. .. Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Order Affirming Order and Decree of Referee as Amended.

This cause came on regularly for hearing in open court on this 4th day of October, 1916, on the certificate of the Referee, and on a petition for review of the order and decree of the Referee made and entered herein on the 15th day of March, 1916, because of certain alleged errors committed by the Referee, as set forth in said petition for review, in ordering

and decreeing that said respondents, J. B. Long, J. W. Long, Margaret M. Long and M. West, are liable to the trustee of said Bankrupt Estate in the sum of thirty-three (33) per cent on each share of the capital stock of said Bankrupt, owned and held by each of said respondents; J. C. Forest, Esquire, appearing for the Trustee of said Bankrupt, and J. S. Jencks, Esquire, appearing for said respondents, and after argument of the respective counsel, the Court took the matter under advisement, and after due consideration thereon;

IT IS ORDERED, that the four orders and decrees of the Referee each dated March 15th, 1916, with reference to the unpaid stock subscriptions of J. B. Long, J. W. Long, Margaret M. Long and M. West, respectively, are hereby affirmed for the reasons given by the learned Referee, Fred A. Larson, except that, J. S. Jencks, attorney for said respondents, having waived any and all objections to the Court making an order amending the four orders and decrees of said Referee, Fred A. Larson, so as to make the obligation created by said orders and decrees, [114] joint and several, without remanding the same to said Referee for amendment;

IT IS FURTHER ORDERED AND DECREED, that the said orders and decrees made and entered by said Referee dated March 15th, 1916, be and the same are amended so as to make the obligation created by said orders and decrees joint and several. That the respondents have thirty (30) days from

the date of this order to pay the amounts respectively due under said order.

Done in open court this 3d day of March, 1917.

WM. H. SAWTELLE,

Judge of the District Court for the State of Arizona.

[115]

[Endorsements]: No. B-101. In the District Court of the United States in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. J. B. Long, J W. Long, Margaret M. Long, and M. West, Respondents. Order Affirming Order and Decree of Referee as Amended. Filed Mar. 3, 1917, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [116]

*In the District Court of the United States in and for
the District of Arizona.*

No. B-101.

In the Matter of PHOENIX HARDWARE COM-
PANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Notice of Appeal.

Come now the respondents, J. B. Long, J. W. Long, Margaret M. Long and M. West, and hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Honorable Court made and entered herein on the 2d day of

March, 1917, wherein and whereby the four orders and decrees heretofore entered herein by the Honorable F. A. Larsen, Referee of said Court, each dated March 15, 1916, levying an assessment of thirty-three per cent on each share of the capital stock of said bankrupt owned and held by each of said respondents, and ordering the payment thereof, were affirmed, and from each and every part thereof.

Dated Phoenix, Arizona, this 2d day of April, 1917.

W. J. KINGSBURY,
JOSEPH S. JENCKES,
Solicitors for Respondents. [117]

[Endorsements]: No. ——. In the United States District Court in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. J. B. Long, J. W. Long, Margaret M. Long and M. West, Respondents. Notice of Appeal. Filed Apr. 3, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Struckmeyer & Jenckes, Attorneys for Respondents. [118]

*In the District Court of the United States in and for
the District of Arizona.*

In the Matter of PHOENIX HARDWARE COM-
PANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Petition for an Order Allowing Appeal.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the District Court, in and for the Dis-
trict of Arizona:

The above-named J. B. Long, J. W. Long, Margaret M. Long and M. West, respondents herein, feeling themselves aggrieved by the order of this Honorable Court, made and entered herein on March 2, 1917, wherein and whereby the four orders and decrees heretofore entered herein by the Honorable F. A. Larsen, Referee of said Court, each dated March 15, 1916, levying an assessment of thirty-three per cent on each share of the capital stock of said bankrupt owned and held by each of said respondents, and ordering the payment thereof, were affirmed for the reasons given by the said Referee, and wherein and whereby said respondents were given thirty days from the date of said order within which to pay said assessments, do hereby appeal from said order and each and every part thereof, to the Circuit Court of Appeals in and for the Ninth Judicial Circuit, for the reasons specified in the assignment of errors which is filed herein, and your petitioners pray that their appeal be allowed and that such citation issue as is provided by law, and that a transcript of [119] the records, proceedings and papers upon which said order was based duly authenticated may be sent to the United States District Court of Appeals in and for the Ninth Judicial Circuit, sitting at the City of San Francisco, State of California, and your petitioners further

pray that the proper order touching the security required by them to perfect their said appeal herein be made.

_____,
 _____,
 Solicitors for Respondents. [120]

*In the District Court of the United States in and for
 the District of Arizona.*

In the Matter of PHOENIX HARDWARE COM-
 PANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
 and M. WEST,

Respondents.

Notice of Appeal.

Come now the respondents, J. B. Long, J. W. Long, Margaret M. Long and M. West, and hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Honorable Court made and entered herein on the 2d day of March, 1917, wherein and whereby the four orders and decrees heretofore entered herein by the Honorable F. A. Larsen, Referee of said Court, each dated March 15, 1916, levying an assessment of thirty-three per cent on each share of the capital stock of said bankrupt owned and held by each of said respondents, and ordering the payment thereof, were affirmed, and from each and every part thereof.

Dated Phoenix, Arizona, this 2d day of April, 1917.

_____,
_____,
Solicitors for Respondents. [121]

*In the District Court of the United States in and for
the District of Arizona.*

In the Matter of PHOENIX HARDWARE COM-
PANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Order Allowing Appeal and Fixing Bond.

This matter coming on for hearing this — day of April, 1917, on the petition of J. B. Long, J. W. Long, Margaret M. Long and M. West, respondents herein, for an order allowing their appeal, it is hereby ordered that an appeal in the above-entitled matter to the United States Circuit of Appeals for the Ninth Circuit be, and the same is hereby allowed as prayed, upon the respondents filing a bond in the sum of \$——, with sufficient surety, conditioned as required by law, for the payment of the costs of such appeal.

Done in open court this — day of April, 1917.

_____,
Judge of the District Court of the United States for
the District of Arizona. [122]

[Endorsements]: No. ——. In the United States District Court in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. J. B. Long, J. W. Long, Margaret M. Long and M. West, Respondents. Petition for an Order Allowing Appeal. Filed Apr. 3, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Struckmeyer & Jenckes, Attorneys for Respondents. [123]

In the District Court of the United States in and for the District of Arizona.

No. B-101.

In the Matter of PHOENIX HARDWARE COMPANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Assignment of Errors.

And now come J. B. Long, J. W. Long, Margaret M. Long and M. West, respondents herein, and make and file this their assignment of errors:

The District Court of the United States of Arizona in making and entering the order of March 2, 1917, affirming the four orders and decrees of the Referee in Bankruptcy of said Court, entered herein on the 15th day of March, 1916, levying an assessment of thirty-three per cent on each share of said respondents, and ordering the payment thereof, is erroneous in each and all of the following particulars:

1. That the said Court erred in affirming the orders and decrees of the said Referee ordering and adjudging as insufficient the response of these respondents to the rule filed herein on November 3, 1915.

2. That the said Court erred in affirming the orders and decrees of the Referee adjudging that respondents subscribed and did not fully pay for the number of shares of stock of said bankrupt corporation, as set forth in said orders, and further decreeing that respondents are liable in the sum of thirty-three per cent of the par value of said stock less the amounts as found in said decrees to have [124] been paid thereon, and ordering the payment thereof, for the reason that as fully appears from the evidence taken before the Referee in said matter, the respondents never subscribed for any of the stock of said corporation, but that respondents became stockholders in said corporation by the sale to it of a certain stock of merchandise in consideration for said capital stock.

3. That the said Court erred in affirming the orders and decrees of the Referee adjudging that the book accounts remaining in the hands of the trustee of said bankrupt as assets of said estate are not collectible, for the reason that the evidence taken before the Referee in said matter shows that no effort has been made by the trustee to collect such book accounts.

4. That the said Court erred in affirming the orders and decrees of the Referee adjudging that the original and only subscribers to the stock of said

bankrupt corporation are the respondents herein, for the reason that the evidence taken before the Referee in said matter does not show that these respondents ever subscribed for any of the stock of said bankrupt corporation.

5. That the said Court erred in affirming the orders and decrees of the Referee adjudging that each of the respondents have paid upon said subscriptions at the rate of twenty per cent of their par value, or Twenty Dollars per share, and that there remains unpaid on each and all of said subscriptions eighty per cent of their par value, or Eighty Dollars per share, for the reason that the evidence taken before the Referee in said matter shows that there never was any subscription to said capital stock by respondents, but that, on the contrary, respondents acquired their stock by the sale to [125] said corporation of a stock of merchandise in consideration for the transfer to respondents of the entire capital stock of said corporation, and that there is no evidence to show that anything remains due from respondents to said corporation in consideration for said stock.

6. That the said Court erred in affirming the orders and decrees of the Referee adjudging that respondents paid for the entire capital stock of said bankrupt corporation the sum of Ten Thousand Dollars, and that with said sum the said bankrupt corporation purchased a stock of goods from the Arizona Hardware and Vehicle Company and paid therefor the sum of Ten Thousand Dollars, for the reason that the evidence taken before the Referee in

said matter shows that respondents did not pay any money to said corporation in consideration for the entire capital stock thereof and that said corporation had no money with which to purchase said stock of merchandise from the Arizona Hardware and Vehicle Company, but that the respondents purchased said stock of goods from the Arizona Hardware and Vehicle Company before the incorporation of the Phoenix Hardware Company, and held title to the same until the incorporation of said company, and then sold and delivered said stock of goods to said company in consideration for the transfer to them of the entire capital stock of said company.

7. That the said Court erred in affirming the orders and decrees of the Referee adjudging that by agreement made at the time respondents subscribed to the capital stock of the bankrupt corporation, respondents by agreement were credited with the unpaid balance of the par value of their said subscriptions by discount, and the stock account between said bankrupt corporation and respondents balanced thereby, for the reason that the evidence taken before the Referee in said [126] matter does not show any such transaction or transactions.

8. That the said Court erred in affirming the orders and decrees of the Referee in adjudging that the facts set forth in said orders of said Referee were in fact a representation to the public by the officers, managers and agents of said bankrupt corporation that all its capital stock had been subscribed for and had been paid in full, for the reason that the evidence taken before the Referee in said matter does

not disclose any such representations, or any facts amounting in law to such representations.

9. That the said Court erred in affirming the orders and decrees of the Referee, for the reason that said orders and decrees so entered by the Referee are void, because the petition upon which said orders and decrees were based does not state facts sufficient to authorize this Court to levy an assessment upon the capital stock of said bankrupt corporation belonging to respondents.

10. That the said Court erred in affirming the orders and decrees of the Referee, for the reason that said orders and decrees so entered by the Referee are void, because the petition upon which said orders and decrees are based upon its face shows that if there was any indebtedness of respondents to the corporation upon the capital stock of said corporation owned by respondents, such indebtedness is barred by the statute of limitations of the State of Arizona, to wit, Paragraphs 711 and 714, Revised Statutes of Arizona, 1913.

11. That the said Court erred in amending the orders and decrees of the Referee so as to make the obligation created by said orders and decrees joint and several, for the reason that the liability of a stockholder in a corporation for the unpaid balance upon his subscription for capital [127] stock is a several liability only.

12. That the Court erred in affirming the orders and decrees of the Referee, for the reason that the facts found by the Referee in making and entering such orders and decrees, and upon which such orders

and decrees were based, are contrary to the evidence introduced at the hearing before the Referee.

W. J. KINGSBURY,
JOSEPH S. JENCKES,
Solicitors for Respondents.

[Endorsements]: In the United States District Court in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. J. B. Long, J. W. Long, Margaret M. Long and M. West, Respondents. Assignment of Errors. Filed Apr. 3, 1917, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Struckmeyer & Jenckes, Attorneys for Respondents. Goodrich Building, Phoenix, Arizona. [128]

*In the District Court of the United States, in and for
the District of Arizona.*

No. B-101.

In the Matter of PHOENIX HARDWARE COM-
PANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Order Allowing Appeal and Fixing Bond.

This matter coming on for hearing this 3d day of April, 1917, on the petition of J. B. Long, J. W. Long, Margaret M. Long and M. West, respondents herein, for an order allowing their appeal, it is hereby ordered that an appeal in the above-entitled

matter to the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby allowed as prayed, upon the respondents filing a bond in the sum of Five Hundred Dollars with sufficient surety, conditioned as required by law, for the payment of the costs of such appeal.

Done in open court this 3 day of April, 1917.

WM. H. SAWTELLE,

Judge of the District Court of the United States for the District of Arizona.

[Endorsements]: In the United States District Court in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. J. B. Long, J. W. Long, Margaret M. Long and M. West, Respondents. Order Allowing Appeal and Fixing Bond. Filed Apr. 3, 1917, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. Struckmeyer & Jenckes, Attorneys for Respondents. Goodrich Building, Phoenix, Arizona. [129]

In the District Court of the United States in and for the District of Arizona.

In the Matter of PHOENIX HARDWARE COMPANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

**Order Under Rule 16, Section 1, Enlarging Time to
File Transcript of Record and Docket Cause.**

It appearing to the Court that additional time is required to prepare the transcript of record herein upon appeal, and other good cause therefor appearing,—

IT IS ORDERED that the time within which the original certified transcript of the record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be and the same is hereby enlarged to and including the 2d day of June, A. D. 1917.

Dated at Phoenix, Arizona, this 20th day of April, 1917.

WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona. [130].

[Endorsements]: No. ——. In the United States District Court in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. J. B. Long, J. W. Long, Margaret M. Long and M. West, Respondents. Order Under Rule 16, Section 1, Enlarging Time to File Transcript of Record and Docket Cause. Filed April 20th, 1917. Mose Drachman, Clerk. Struckmeyer & Jenckes, Attorneys for Respondents. [131]

*In the District Court of the United States in and for
the District of Arizona.*

In the Matter of PHOENIX HARDWARE COM-
PANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Praeceptum for Transcript of Record.

To the Clerk of the United States District Court for
the State of Arizona:

You will please prepare a transcript of the record
in the above-entitled cause to be filed in the office of
the Clerk of the United States Circuit Court of Ap-
peals for the Ninth Judicial Circuit, under the ap-
peal to be perfected to said Court in said cause, and
include in said transcript the following proceedings,
pleadings, papers, records and files, to wit:

Petition of C. B. Christy for an order directing trustee to make assessment.

Reply of respondents to petition of C. B. Christy.

Findings of fact and order of Referee directing trustee to make assessment.

Reporter's transcript of testimony and proceedings before Referee in Bankruptcy.

Petition for review of order of Referee.

Order affirming order and decree of Referee as amended.

Notice of appeal.

Petition for an order allowing appeal.

Assignment of errors.

Order allowing appeal and fixing bond.

Bond on appeal.

Citation.

Praeceptum for transcript.

Trustee's Exhibits 1, 2, 4, filed in hearing before
Referee.

W. J. KINGSBURY,
JOSEPH S. JENCKES,
Attorneys for Respondents. [132]

[Endorsements]: In the District Court of the United States in and for the District of Arizona. In the Matter of the Phoenix Hardware Company, Bankrupt. J. B. Long, J. W. Long, Margaret M. Long and M. West, Respondents. Praeceptum for Transcript of Record. Struckmeyer & Jenckes, Attorneys for Respondents. Filed May 12, 1917, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [133]

*In the District Court of the United States for the
District of Arizona.*

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Appellants,

vs.

CHARLES B. CHRISTY, as Trustee in Bankruptcy of the Estate of PHOENIX HARDWARE COMPANY, a Corporation, Bankrupt,

Appellee.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, J. B. Long, J. W. Long, Margaret M. Long and M. West, as principals, and Harry Lukin and W. Lukin, as sureties, are held and firmly bound unto Charles B. Christy, as trustee in bankruptcy of the estate of Phoenix Hardware Company, a corporation, bankrupt, appellee, and to his successor or successors in said trust, in the full sum of Five Hundred (\$500) Dollars, said sum being the amount of the bond fixed by the District Court of the United States for the District of Arizona, by order duly entered on the records of said Court on April 3d, 1917, to be paid to the said Charles B. Christy, appellee, or to his successor or successors in said trust, to which payment well and truly to be made we bind ourselves, and our and each of our heirs, executors, administrators and legal representatives jointly and severally by these presents.

Sealed with our seals and dated this 25 day of April, in the year of our Lord, 1917.

The condition of the above obligation is such that, WHEREAS, on the 2d day of March, 1917, at the District Court of the United States for the District of Arizona, in a certain [134] controversy in bankruptcy then pending in said court, wherein the appellee, Charles B. Christy, as trustee in bankruptcy of the estate of Phoenix Hardware Company, a corporation, bankrupt, was petitioner, and appellants, J. B. Long, J. W. Long, Margaret M. Long and M. West, were respondents, a judgment was rendered in favor of the said petitioner and against J. B.

Long, J. W. Long, Margaret M. Long, and M. West, respondents, affirming four certain orders and decrees of the Referee in Bankruptcy of said Court, each dated March 15th, 1916, levying an assessment of thirty-three per cent (33%) on each share of the capital stock of said Phoenix Hardware Company, bankrupt, owned and held by each of said respondents, and ordering the payment thereof; and

WHEREAS, the said J. B. Long, J. W. Long, Margaret M. Long and M. West, respondents, have appealed from said judgment which said appeal has been allowed by said District Court of the United States for the District of Arizona, and has obtained from said Court a citation directed to the said Charles B. Christy, trustee, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California;

NOW, THEREFORE, if the said J. B. Long, J. W. Long, Margaret M. Long and M. West shall prosecute their said appeal to effect and answer all costs, if they fail to make said plea good, then the above obligation to be void; otherwise to remain in full force and effect.

J. B. LONG,
Principal.

J. W. LONG,
Principal.

MARGARET M. LONG,
Principal.

W. WEST,
Principal.

HARRY LUKIN,
Surety.

W. LUKIN,
Surety.

The above and foregoing bond approved this — day of April, 1917.

_____,
Clerk. [135]

State of Arizona,
County of Maricopa,—ss.

W. Lukin and Harry Lukin, whose names are subscribed to the within bond, being severally duly sworn, each for himself, deposes and says: That he is a resident and householder within the County of Maricopa, State of Arizona; that he is worth the sum of Five Hundred and no/100 Dollars (\$500) over and above all his just debts and liabilities, and over and above all property exempt from execution and forced sale.

[Seal]

W. LUKIN.
HARRY LUKIN.

Subscribed and sworn to before me this 23 day of April, A. D. 1917.

T. W. KINGSBURY,
Notary Public.

Com. expires Feb. 16, 1920. [136]

[Endorsements]: In the District Court of the United States for the District of Arizona. J. B. Long, J. W. Long, Margaret M. Long and M. West, Appellants, vs. Charles B. Christy, as Trustee in Bankruptcy of the Estate of Phoenix Hardware Company, a Corporation, Bankrupt, Appellee. Bond. Filed May 23, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [137]

*In the United States District Court for the District
of Arizona.*

No. B-101 (Phoenix).

In the Matter of the PHOENIX HARDWARE
COMPANY, a Bankrupt.

**Order Under Rule 16, Section 1, Enlarging Time to
June 15, 1917, to File Record Thereof and to
Docket Cause.**

Upon consideration of the application of Mr. Mose Drachman, the Clerk of the United States District Court for the District of Arizona, and good cause therefor appearing,—

IT IS ORDERED that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be and hereby is enlarged to and including the 15th day of June, A. D. 1917.

Dated May 31st, 1917.

WM. H. SAWTELLE,

Judge of the United States District Court for the
District of Arizona.

[Endorsements]: No. B-101 (Phoenix). United States District Court, District of Arizona. In the Matter of the Phoenix Hardware Co., Bankrupt. Order Extending Time Within which to File and Docket Transcript of Record on Appeal. Filed May

31st, 1917, at — M. Mose Drachman, Clerk. By
R. E. L. Webb, Deputy. [138]

*In the United States District Court for the District
of Arizona.*

No. B-101 (Phoenix).

In the Matter of the PHOENIX HARDWARE
COMPANY,

Bankrupt.

**Certificate of Clerk of United States District Court
to Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify the 150 typewritten pages, numbered from 1 to 150, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and it is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal from the judgment of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on be-

half of the respondents for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:
[139]

Clerk's fee (Sec. 828, R. S. U. S. as amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of record—414 folios at 20¢ per folio.....	\$82.80
Certificate of Clerk to typewritten transcript of record, 4 folios at 30¢ per folio.....	1.20
Seal to said Certificate.....	.40
	<hr/>
	\$84.40

I hereby certify that the above cost for preparing and certifying record, amounting to \$84.40, has been paid to me by Joseph S. Jenckes, one of counsel for the respondents herein.

I further certify that I hereto attach and herewith transmit the original Citation in this cause.

WITNESS my hand and the Seal of said District Court affixed this 12th day of June, A. D. 1917, at Phoenix, Arizona.

[Seal]

MOSE DRACHMAN,

Clerk.

By Edith A. Webb,

Deputy. [140]

*In the District Court of the United States, in and for
the Distirct of Arizona.*

In the Matter of PHOENIX HARDWARE
COMPANY,

Bankrupt.

J. B. LONG, J. W. LONG, MARGARET M. LONG
and M. WEST,

Respondents.

Citation on Appeal.

President of the United States of America to
Charles B. Christy, Trustee of the Estate of
Phoenix Hardware Company, a Corporation,
Bankrupt:

You are hereby notified that in a certain matter in
bankruptcy in the United States District Court in
and for the District of Arizona, wherein Charles B.
Christy, as trustee of the estate of Phoenix Hardware
Company, a corporation, bankrupt, is petitioner, and
J. B. Long, J. W. Long, Margaret M. Long, and M.
West, are respondents, an appeal has been duly al-
lowed to said J. B. Long, J. W. Long, Margaret M.
Long and M. West, respondents, to the United States
Circuit Court of Appeals in and for the Ninth Ju-
dicial Circuit. You and each of you are hereby cited
and admonished to be and appear in the said Court
at the City of San Francisco, State of California,
within thirty days from the date of this citation, to
show cause, if any there be, why the order of March
2, 1917, affirming the four orders and decrees of the

Referee of said Court, each dated March 15, 1916, levying an assessment of thirty-three per cent on each share of the capital stock of said bankrupt owned and held by each of said respondents, and ordering the payment thereof, which [141] said order is appealed from herein, should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court in and for the District of Arizona, this 3d day of April, 1917.

WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona.

Service of the foregoing citation is acknowledged and accepted this 3d day of April, 1917.

J. C. FOREST,
Solicitor for Trustee in Bankruptcy of the Estate of
Phoenix Hardware Co., a Corporation, Bank-
rupt. [142]

[Endorsed]: No. B-101. In the United States District Court, in and for the District of Arizona. In the Matter of Phoenix Hardware Company, Bankrupt. J. B. Long, J. W. Long, Margaret M. Long, and M. West, Respondents. Citation. Filed Apr. 3, 1917, at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [143]

[Endorsed]: No. 3011. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Phoenix Hardware Company, a Cor-

poration, Bankrupt. J. B. Long, J. W. Long, Margaret M. Long and M. West, Appellants, vs. Charles B. Christy, as Trustee of the Estate of Phoenix Hardware Company, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed June 15, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the PHOENIX HARDWARE COMPANY,
a corporation, Bankrupt, J. B. LONG, J. W. LONG,
MARGARET M. LONG and M. WEST,

Appellants,

vs.

CHARLES B. CHRISTY, as Trustee of the ESTATE OF
PHOENIX HARDWARE COMPANY, a corporation,
Bankrupt,

Appellee.

Brief for the Appellants.

W. J. KINGSBURY,
JOSEPH S. JENCKES,
Attorneys for Appellants.

METSON, DREW & MACKENZIE,
and E. H. RYAN,
Of Counsel.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

In the Matter of the PHOENIX HARD-
WARE COMPANY, a corporation,
Bankrupt, J. B. LONG, J. W. LONG,
MARGARET M. LONG and M.
WEST,

Appellants,

vs.

No. 3011

CHARLES B. CHRISTY, as Trustee of
the ESTATE OF PHOENIX HARD-
WARE COMPANY; a corporation,
Bankrupt,

Appellee.

BRIEF FOR THE APPELLANTS.

This is an appeal from an order made by the Hon-
orable William H. Sawtelle, Judge of the District
Court in and for the District of Arizona, on the 2nd
day of March, 1917, affirming four certain orders and
decrees theretofore entered by F. A. Larson, Referee
of said court, each dated March 15, 1916, levying an

assessment of thirty-three (33) per cent. on each share of the capital stock of the Phoenix Hardware Company, a corporation, bankrupt, owned and held by the appellants herein, and wherein and whereby said appellants were given thirty (30) days from the date of said orders within which to pay said assessments, and amending the orders of the referee by making the obligation created by said orders joint and several (Tr., p. 105).

The facts are briefly these:

The Arizona Hardware and Vehicle Company was bankrupt and one J. B. Long, who was the manager of the said Company and entirely familiar with its stock, bought its stock of hardware merchandise for which he and M. West paid jointly ten thousand (\$10,000.) dollars, to be exact not less than nine thousand nine hundred and fifty (\$9,950) dollars (Tr., pp. 44, 58).

This stock was new, clean stock and was fully of the wholesale value of \$20,000 and of the retail value of from \$29,000 to \$30,000 (Tr., pp. 48, 49). This stock was purchased on the 9th day of March, 1907, J. W. Long paying \$1500 on account on that day (Tr., 92).

Thereafter the Phoenix Hardware Company was incorporated to wit: on March 19, 1907 (Tr., 84-88). J. B. Long and M. West, after the incorporation of the said Company, sold to the Company this stock of merchandise which they had purchased from the

Arizona Hardware and Vehicle Company the entire capital stock of the Phoenix Hardware Company being issued to them in payment therefor (Tr., 46). The 500 shares of the stock of the said Company was issued to Long and West in the following proportions: 250 shares to West, 130 shares to J. B. Long, 80 shares to J. W. Long and 40 shares to Margaret M. Long, J. W. Long's half of said capital stock being divided between himself and the members of his family.

At the time of the sale of this merchandise to the Phoenix Hardware Company and the issuance of this stock in payment therefor, the said Phoenix Hardware Company had no assets of any kind and no subscriptions had ever been made to the stock of the Company (Tr., 50). After the incorporation of the Company J. B. Long, J. W. Long and M. West became the Board of Directors and continued to be such board of directors for seven years or more or until on the 24th day of October, 1914, the Phoenix Hardware Company was adjudicated a bankrupt (Tr., 15).

More than one year after the date of the adjudication of said Company as a bankrupt, to wit: on the 25th day of October, 1915, Charles B. Christy, the trustee in bankruptcy, filed a petition with the referee in bankruptcy praying for an order directing him to make an assessment and call upon the unpaid subscriptions to the stock of the said bankrupt for the purpose of paying its debts (Tr., 1-9), to which petition the

appellants demurred on the ground that the said petition did not state facts sufficient to authorize the court to levy such assessment; also pleading in bar the Statute of Limitations of Arizona; denying that they had ever subscribed for any stock of the Phoenix Hardware Company and defending and setting up the acquisition of the number of shares of capital stock owned by them through a sale to the Phoenix Hardware Company of a stock of merchandise of the value of \$20,000 (Tr., 10-11-12).

After testimony taken, appellants made a motion to dismiss the petition which was denied (Tr., 80).

The referee thereafter made his findings of fact in favor of the trustee and against the appellants, holding that the said appellants had subscribed to the stock of the Phoenix Hardware Company, M. West for 250 shares, J. B. Long for 130 shares, J. W. Long for 80 shares, and Margaret M. Long for 40 shares; and that said subscribers had paid on said subscriptions at the rate of 20 per cent. of their par value or \$20 per share and that the said subscribers had paid for the entire capital stock of the said company the sum of \$10,000 which the said Phoenix Hardware Company, through its officers and agents, had used in the purchase of a stock of goods from the Arizona Hardware and Vehicle Company, paying therefor the sum of \$10,000; and that there was due 80 per cent. of the par value of said stock from each of said subscribers; and made four separate orders, holding respectively

that M. West was liable in the sum of 33 per cent. of the par value of 250 shares of the stock of the Phoenix Hardware Company, subscribed for by her, less \$5,000 paid thereon, or in the sum of \$3250; that J. B. Long was liable in the sum of 33 per cent. of the par value of 130 shares of the stock of Phoenix Hardware Company subscribed by him less \$2600 paid thereon or in the sum of \$1690; that J. W. Long was liable in the sum of 33 per cent. of the par value of 80 shares of the stock of the Phoenix Hardware Company subscribed for by him less \$1600 paid thereon or in the sum of \$1040; and that Margaret M. Long is liable in the sum of 33 per cent. of the par value of 40 shares of the stock of said Phoenix Hardware Company subscribed for by her and less \$800 paid thereon or in the sum of \$520 (Tr., 13-23).

Thereafter the appellants herein made an application to the District Court of the United States for the District of Arizona for a review of the orders of the referee, assigning as error all of the material findings of fact of the said referee (Tr., 92-95).

A hearing was had by the Court upon the certificate of the referee and on the petition for review of the order made by appellants and thereafter the court made its order affirming the order and decree of the referee and amending the same so as to make the obligation created by said orders and *decrees joint and several* instead of several (Tr., 105-6).

From this order of the court the appellants take this appeal and assign the following errors upon which they will rely for the reversal of the order:

ASSIGNMENT OF ERRORS.

The District Court of the United States of Arizona in making and entering the order of March 2, 1917, affirming the four orders and decrees of the Referee in Bankruptcy of said Court, entered herein on the 15th day of March, 1916, levying an assessment of thirty-three per cent. on each share of said respondents, and ordering the payment thereof, is erroneous in each and all of the following particulars:

1. That the said Court erred in affirming the orders and decrees of the said Referee ordering and adjudging as insufficient the response of these respondents to the rule filed herein on November 3, 1915.

2. That the said Court erred in affirming the orders and decrees of the Referee adjudging that respondents subscribed and did not fully pay for the number of shares of stock of said bankrupt corporation, as set forth in said orders, and further decreeing that respondents are liable in the sum of thirty-three per cent. of the par value of said stock less the amounts as found in said decrees to have been paid thereon, and ordering the payment thereof, for the reason that as fully appears from the evidence taken before the Referee in said matter, the respondents never subscribed for any of the stock of said corporation, but

that respondents became stockholders in said corporation by the sale to it of a certain stock of merchandise in consideration for said capital stock.

3. That said Court erred in affirming the orders and decrees of the Referee adjudging that the book accounts remaining in the hands of the trustee of said bankrupt as assets of said estate are not collectible, for the reason that the evidence taken before the Referee in said matter shows that no effort has been made by the trustee to collect such book accounts.

4. That the said Court erred in affirming the orders and decrees of the Referee adjudging that the original and only subscribers to the stock of said bankrupt corporation are the respondents herein, for the reason that the evidence taken before the Referee in said matter does not show that these respondents ever subscribed for any of the stock of said bankrupt corporation.

5. That the said Court erred in affirming the orders and decrees of the Referee adjudging that each of the respondents have paid upon said subscriptions at the rate of twenty per cent. of their par value, or twenty dollars per share, and that there remains unpaid on each and all of said subscriptions eighty per cent. of their par value, or eighty dollars per share, for the reason that the evidence taken before the Referee in said matter shows that there never was any subscription to said capital stock by respondents, but that, on the contrary, respondents acquired their stock by

the sale to said corporation of a stock of merchandise in consideration for the transfer to respondents of the entire capital stock of said corporation, and that there is no evidence to show that anything remains due from respondents to said corporation in consideration for said stock.

6. That the Court erred in affirming the orders and decrees of the referee adjudging that respondents paid for the entire capital stock of said bankrupt corporation the sum of ten thousand dollars, and that with said sum the said bankrupt corporation purchased a stock of goods from the Arizona Hardware and Vehicle Company and paid therefor the sum of ten thousand dollars, for the reason that the evidence taken before the Referee in said matter shows that respondents did not pay any money to said corporation in consideration for the entire capital stock thereof and that said corporation had no money with which to purchase said stock of merchandise from the Arizona Hardware and Vehicle Company, but that the respondents purchased said stock of goods from the Arizona Hardware and Vehicle Company before the incorporation of the Phoenix Hardware Company, and held title to the same until the incorporation of said company, and then sold and delivered said stock of goods to said Company in consideration for the transfers to them of the entire capital stock of said company.

7. That the said Court erred in affirming the orders and decrees of the Referee adjudging that by

agreements made at the time respondents subscribed to the capital stock of the bankrupt corporation, respondents by agreement were credited with the unpaid balance of the par value of their said subscriptions by discount, and the stock account between said bankrupt corporation and respondents balanced thereby, for the reason that the evidence taken before the Referee in said matter does not show any such transaction or transactions.

8. That the said Court erred in affirming the orders and decrees of the Referee in adjudging that the facts set forth in said orders of said Referee were in fact a representation to the public by the officers, managers and agents of said bankrupt corporation that all its capital stock had been subscribed for and had been paid in full, for the reason that the evidence taken before the Referee in said matter does not disclose any such representations, or any facts amounting in law to such representations.

9. That the said Court erred in affirming the orders and decrees of the Referee, for the reason that said orders and decrees so entered by the Referee are void, because the petition upon which said orders and decrees were based does not state facts sufficient to authorize this Court to levy an assessment upon the capital stock of said bankrupt corporation belonging to respondents.

10. That the said Court erred in affirming the orders and decrees of the Referee, for the reason that

said orders and decrees so entered by the Referee are void, because the petition upon which said orders and decrees are based upon its face shows that if there was any indebtedness of respondents to the corporation upon the capital stock of said corporation owned by respondents, such indebtedness is barred by the statute of limitations of the State of Arizona, to wit, Paragraphs 711 and 714, Revised Statutes of Arizona, 1913.

11. That the said Court erred in amending the orders and decrees of the Referee so as to make the obligation created by said orders and decrees joint and several, for the reason that the liability of a stockholder in a corporation for the unpaid balance upon his subscription for capital stock is a several liability only.

12. That the Court erred in affirming the orders and decrees of the Referee, for the reason that the facts found by the Referee in making and entering such orders and decrees, and upon which such orders and decrees were based are contrary to the evidence introduced at the hearing before the Referee.

ARGUMENT.

The position of appellants indicated by the errors assigned is this:

1. That no subscription of stock was ever entered into by appellants or any one of them; that the corporation had no subscribers.

2. That if, as claimed by appellee, there was a stock subscription as a matter of law, any liability for the alleged unpaid amount thereon would be several, instead of joint and several; and such liability, if any, was barred by the statute of limitations long before the company became bankrupt; or if not so barred as to creditors was barred as to them at the date of instituting the proceedings for the assessment of the stock of appellants.

An examination of the evidence will show an entire absence of any subscription on the part of any one of the appellants to the stock of the bankrupt corporation. The facts show that J. B. Long was one of the purchasers of the stock of merchandise from the Arizona Hardware & Vehicle Co. (J. B. Long paying on account of the contract of sale \$1500. on March 9, 1907, Tr. 92), M. West joining with him in the purchase of the same. That some twelve days subsequent to such purchase said J. B. Long and his son, J. W. Long, filed articles of incorporation of the Phoenix Hardware Company (Tr., 83-88).

It appears from the uncontradicted testimony of J. B. Long that \$10,000. was paid for this stock of merchandise and fixtures (Tr., 48) or possibly \$50. less than this sum (Tr., 58). The stock was clean and new and its inventory value at wholesale was a little over \$20,000., its retail value being \$29,000. or \$30,000. (Tr., 48-9).

After the company was incorporated on March 19, 1907, all of this merchandise, as we have stated, was sold by J. B. Long and M. West to the company in the company issuing its entire capital stock to J. B. Long and M. West in payment therefor, equally to be owned by them and the stock was issued as fully paid. J. B. Long testified he had his one-half issued to various members of his family, some to him, to his son and to his wife (Tr., 52). The Longs and M. West became officers in the company, which proceeded to do business and continued doing business for seven years, or until October 24, 1914, when it was adjudged a bankrupt. No stock subscriptions were ever signed or entered into verbally. No agreement was ever entered into as to the taking of any stock (Tr., 42). The stock was issued to the appellants in payment for the fixtures and merchandise sold.

We submit that the finding of the referee, affirmed by the Court that "the *original* and only *subscribers* to the stock of said company and the amount *subscribed* for by each on the 19th day of March, 1907,

are the following: M. West, 250 shares; J. B. Long, 100 shares; J. W. Long, 80 shares; Margaret M. Long, 40 shares"; and the further finding "that each of said *subscribers* have paid on said *subscription* at the rate of 20 per cent. of their par value, or \$20. per share and there remains unpaid on each and all of said subscriptions 80 per cent. of their par value, or \$80. per share" is without any basis in fact (Tr., 16). Assignments of Error, 2, 4, 5, 7, 9.

It is only upon the theory that the transaction whereby respondents obtained their stock in the bankrupt company, is a "legal" or "constructive" fraud, or, in other words, "fraudulent per se," that the trustee seeks to hold them personally liable for the debts of the bankrupt. There is no allegation or proof of actual fraudulent intent, and so, if the trustee's contention is to be sustained it must be solely upon the theory that the transaction between appellants and the company was a subscription for \$50,000. worth of the capital stock of the company upon which a payment in merchandise of the value of \$20,000. was made, and that under the so-called "trust fund doctrine" appellants are liable to creditors to the extent of the unpaid balance of the subscription.

The allegations of the petition are wholly insufficient, in the light of the evidence adduced by the trustee upon the hearing, to support a finding in his favor, the *allegations* and the *proof* being wholly at variance. The allegations are that appellants *sub-*

scribed for the capital stock of the bankrupt company and *made partial payments in cash thereon* (Par. VIII of petition Tr., 3), that the unpaid balance thereof was "credited by discount and the stock account between the said bankrupt corporation and said subscribers was balanced by such discount" (Par. IX of Petition, Tr., 5). The proof offered disclosed an entirely different transaction from the allegations of the petition, namely, a sale to the corporation, as we have shown, by appellants of a stock of hardware of the actual value of \$20,000.00 for the entire capital stock of the corporation. No motion having been made to amend the petition to conform to the proof, appellants were entitled to a dismissal of the petition upon their motion.

However, even though the petition be considered as amended in that respect, appellants contend that they are entitled to its dismissal on the ground that the state of facts disclosed by the evidence adduced upon the hearing did not warrant the Court below in ordering a call and assessment upon the stock of the corporation, for the following reasons, to-wit:

1. It is shown that there were assets belonging to the bankrupt at the time of the adjudication, more than sufficient in value to pay the outstanding debts of the bankrupt, but that, through no fault of appellants, and wholly by reason of the neglect of the creditors and of the trustee in bankruptcy, these as-

sets have been permitted to become worthless, or nearly so (Testimony of Christy, Tr., 58-68).

2. There having been no "subscription" for the stock of the company, there was no agreement that appellants would pay anything for it beyond what they gave in exchange for it, and consequently there was no contract or agreement to pay balance on any subscription price which a court of equity can enforce (Tr., 42).

3. The contract must either stand or fall in its entirety. If the transaction was in fraud of creditors, the creditors cannot avail themselves of it by partaking of its fruits in the way of dividends paid from the sale of the merchandise given by appellants for the stock of the corporation and at the same time demand that appellants pay to them the balance of their claims out of their pockets. To do so would be contrary to the maxim that "he who seeks equity must do equity."

4. The trustee should not prevail unless it be affirmatively shown that the creditors of the bankrupt company extended credit to it without knowledge of the facts and circumstances under which appellants obtained their stock, and further that in so extending credit they relied upon representations that the entire capital stock of the corporation was fully paid up. The petition contains such an allegation (Tr., 5), but

no evidence was adduced upon the hearing in support thereof.

5. And so we repeat, the only theory upon which the trustee seeks to hold appellants liable for the debts of the bankrupt, is that the transaction whereby they obtained their stock was actually a contract of subscription—\$20,000.00 worth of merchandise being paid upon the subscription price and the balance remaining unpaid being, as to subsequent creditors, a “trust fund” applicable to the payment of their claims. But even if this be true, we contend that appellants cannot at this late day be called upon to pay the subscriptions in the absence of any fraudulent agreement with the corporation whereby it was understood that they were not to pay them (and the evidence does not reveal any such understanding), for the reason that by the terms of the articles of incorporation of the bankrupt company “all subscriptions for the capital stock of said corporation shall be paid in to the corporation within thirty days from the time such stock is subscribed for” (Tr., 85). The transaction whereby appellants acquired their stock occurred on March 19th, 1907; so, even if such transaction is to be treated as a subscription for stock, such subscriptions were due and payable without further call within thirty days from March 19th, 1907, to-wit: April 18th, 1907, upon which date the statute of limitations commenced to run and has long since barred the collection of the debt; or if it be held that

the statute begins to run from date of adjudication of insolvency, it is still barred, as the trustee did not institute this proceeding in time.

I.

The Court erred in affirming the orders and decrees of the referee adjudging that the book accounts remaining in the hands of the trustee as assets of the bankrupt estate were not collectible for the reason that the evidence taken before the referee in said matter shows that no effort had been made by the trustee to collect such book accounts (Assignment of Error, 3).

No attempt was made by the receiver in the State receivership nor by the trustee in the Court of Bankruptcy to collect the outstanding bills receivable. All the trustee did in carrying out his trust which made it incumbent on him to collect all assets was to make some inquiries through local collectors and take their judgment that bills amounting to some \$4,000 were uncollectible. All that was collected by both the Receiver and the Trustee was some \$631.81 (Tr., 62), The major portion of these bills were allowed to outlaw (Tr., 66) and the amounts thereof thereby lost to the creditors through failure of the Trustee to prosecute suits for the recovery of the amounts due. It is well known that where creditors fail to pay their accounts, when prodded thereto by an action at law, the coin is forthcoming.

“This is a trustee’s first duty vested with the title

of the bankrupt; he is also the representative of the creditors. He is further a quasi officer of the court. He must proceed to collect and reduce to money the property . . . under the direction of the Court and close up the estate as expeditiously as is compatible with the best interests of the parties. This he may do by, for instance, *collecting* accounts, even by suit. . . .”

Collier on Bankruptcy, Sec. 47, p. 36,607;
Remington on Bankruptcy, Vol. 1, Sec. 907;
In re Stein, 94 Fed., 124.

The purpose of the Bankruptcy Act is to enable or to compel a debtor who has become involved financially to turn over all his assets to his creditors that they may make the most out of them in satisfaction of their claims. And when assets are thus turned over to creditors the bankrupt has a right to expect that they will be so handled that the returns thereon will be as great as may be consistent with all the circumstances under which it may be necessary to dispose of them. Outstanding accounts due to a bankrupt are assets in every sense of the word and the trustee must use due diligence to realize upon such accounts the same as upon other assets of the estate. A trustee in bankruptcy is liable for gross negligence in the administration of the estate, and we say that for the trustee in this case to sit idly by and to permit \$4,000.00 worth of accounts belonging to the estate to become barred by the statute of limitations without making any determined effort to collect them

beyond obtaining the opinion of various collection agents as to their collectibility (Tr., Test. of Christy, 58, 68; Shedd, Tr., 68-77; Taylor, Tr., 77-79), is gross negligence, especially in view of the testimony given by one of the collection agents upon the hearing that in his experience 75% of accounts of this character are collectible if suit is brought upon them (Tr., 77).

II. III.

It is conceded that if the trustee's contention be sustained, it must be on the theory of common law liability—and such must be the case, for the Arizona statutes contain no restriction upon the method or manner of issuing the capital stock of corporations, leaving such regulations entirely to the corporation itself (Par. 2100, subd. (3), Rev. Stat. Ariz., 1913). To be sure, par. 2109 of the Arizona Statutes provides that “nothing herein shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them,” but such provision is merely declarative of the common law. And so it is only on the theory of the common law liability that the capital stock of the bankrupt company standing in the name of these appellants is sought to be assessed.

It is clear from the evidence adduced upon the hearing that there was no subscription made by appellants for their stock, and that they acquired it through the sale of a stock of merchandise to the

company and in payment therefor. Therefore we say there is no agreement on the part of appellants to pay a balance on any subscription price which a court of equity can enforce.

The record speaks for itself and indicates one of the usual and ordinary methods employed daily in business life in the incorporation of companies. The statute does not insist upon subscriptions to the stock nor prohibit the payment in stock for property. It was therefore in form to organize the corporation without subscriptions and then purchase property and pay therefor in stock.

The officers of the company were within the powers of their charter when they issued the capital stock of the company in payment for merchandise and fixtures for, by Article III of the Articles of Incorporation, it is provided that "the Board of Directors of said Company may accept merchantable hardware at such prices as they may deem proper in part or full payment for any subscriptions to the stock of this corporation" (Tr., 85).

The fact that the property turned over was valued at less than par, where the procedure was followed in entire good faith, and untainted with actual fraud, will not render the stockholder appellants liable for the difference between the value of the stock at par and the amount turned over in property. There was no agreement to buy stock, but to sell merchandise.

There are no allegations of fraud and there was no proof of fraud.

The common law doctrine with respect to property taken by a corporation at an over-valuation in exchange for its capital stock is well stated in the Sixth Edition of Cook on Corporations, at paragraph 46:

“At common law it is well settled that corporate creditors cannot hold stockholders liable on stock which has been issued for property, even though the property was turned over to the corporation at an agreed valuation which was largely in excess of the real value of the property. There have been cases which refuse to follow this rule, but it is clearly established by the great weight of authority. The reason of the rule is that if the payment by property was fraudulent, then the contract is to be treated like other fraudulent contracts. It is to be adopted in toto, or rescinded in toto and set aside. Both parties are to be restored as nearly as possible to their original positions. The property or its value is to be returned to the person receiving the stock, and he must return the stock or its real value. In New York and in England, as stated above, at common law the stockholder is not liable at all to corporate creditors, even though the overvaluation was gross and clearly known so to be. The remedy is rescission, and not the making of a *new contract by the court.*”

“At common law there is no contract, express or implied, to pay to the corporation or to corporate creditors the par value of stock which is issued for property. Not only is there no such contract, but there is no implied fraud even though the property was overvalued. If there is express fraud the law provides ample remedies, but such

a fraud must be clearly proven and is not implied from proof that the property was worth less than the par value of the stock.”

In the case of *Coffin v. Ransdell*, 110 Ind., 417, the foregoing statement of the common law rule is upheld, the Court therein saying:

“Suppose it to be true that, in consummating the arrangement, the property of Unthank & Coffin was turned in to the corporation at an overvaluation, and that the defendant and the other incorporators participated in the alleged wrong. The transaction was the result of an agreement which the parties had the right, as between themselves, to make. . . . Shall (defendant) be capriciously punished by being made liable *ex contractu* upon a contract which he never made? If the defendant has participated in a fraud whereby the creditors of the corporation who exercised ordinary business sagacity have suffered damage, whatever redress such creditors may now obtain, while their representative retains the defendant’s property, must be sought by an action *ex delicto*.”

And in *Horton v. Sherill-Russell Lumber Co.*, 143 S. W. 1053 (Ky.), the Court quoted with approval the text of *Cook on Corporations* as set forth above, and held that no recovery could be had at common law in a similar case.

In *Seaboard etc. Bank v. Slater*, 117 Fed. 1002, the Court held that stock given as a bonus does not render the holder liable to creditors for the par value thereof, “he not having subscribed for it or agreed to

“pay for it, and there being no proof that any creditor was injured thereby.”

A distinction must be drawn between the classes of cases which have been decided under various statutory provisions and those decided at common law. Many cases can be found where stockholders have been required to pay the difference between the par value of stock received by them for property and the actual value of such property, but in by far the majority of such cases the requirement has either been based upon the provisions of *some statute* or upon allegation and proof of *actual fraud* perpetrated upon creditors by reason of the transaction. In *Clark v. Beaver*, 139 U. S. 96-35, L. ed. 88, Chief Justice Harlan said:

“If the legislature had intended that the acquisition of stock at less than its face value should be conclusive evidence in every case that the stock, as between creditors and stockholders, is ‘unpaid’ it would have been easy to so declare, *at has been done in some of the States*. If such a rule be demanded by considerations of public policy, the remedy is with the legislative department of the government creating the corporation. A rule so explicit and unbending could be enforced without injustice to anyone, for all would have notice from the statute of the will of the Legislature. It is not for the courts by mere interpretation of a statute, not justified by its language, to accomplish objects that are within the exclusive province of legislation. *If*, when receiving the 910 shares of stock in payment of his portion of the claim of \$70,000 against the railroad company, *Greene had*

supposed that he would thereby become liable to account to creditors for its full face value without regard to the real value of the stock, and whether the corporation subsequently became bankrupt or not, he certainly would not have taken it."

And so in the case at bar, if these appellants, when receiving their stock in exchange for the merchandise, had supposed that they would thereby become liable to creditors for its full face value without regard to the real value of the stock, they certainly would not have taken it.

In the case of *Clark v. Bever, supra*, plaintiff in error urged that the previous decisions of the Supreme Court of the United States required them to hold that a stockholder taking stock in exchange for property at an overvaluation is bound to creditors for the face value of the stock, but the Chief Justice said that *in all those cases there was an actual subscription* of a given amount—cases of promises to pay the company the amount subscribed, not of sales by it. In the case at bar there are no promises by appellants to pay anything. The only contract was the sale or exchange of the merchandise for the stock and for this Court to hold appellants liable as for an unpaid balance on subscriptions of stock, is to make an entirely different contract of the transaction.

This Court must be governed by the decisions of the Supreme Court of the United States in determining this question, and we insist that in no case similar

to the case at bar has that Court undertaken to make a *new contract between* the parties and then to *enforce it*.

IV.

It is only when fraud enters into a transaction of this kind that the stockholders can be held responsible. And the fraud must be "actual" fraud, not "constructive." See *Dupont v. Felden*, 42 Fed., 87, wherein it was held that a stockholder was not liable for the difference in value of land taken at a great overvaluation where there was no *actual* fraud in the transaction. As laid down in *Cook on Corporations, supra*,

"Not only is there no such contract but there is no implied fraud even though the property was overvalued. If there is *express* fraud the law provides ample remedies, but such fraud must be *clearly proven* and is *not implied* from proof that the property was worth less than the par value of the stock."

This is the true rule to be followed in the absence of any statutory provisions to the contrary, and in Arizona we have seen that there are no such statutory provisions. That this is the rule is amply demonstrated by the following authorities:

"Where full paid stock is issued for property,

there must be *actual* fraud to enable creditors to call stockholders to account."

Bank of Ft. Madison v. Alden, 129 U. S., 372-32 Law Ed., 725.

In *Cort v. Amalgamating Co.*, 119 U. S., 343; 30 L. Ed., 420, the Court say on this subject:

"The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value . . . that the articles had no market or actual value, and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscriptions. If it were proved that *actual* fraud was committed in the payment of the stock and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where . . . the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. . . . But where full paid stock is issued for property received, there *must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account.*"

In *Lake Superior Iron Co. v. Drexel*, 90 N. Y., 87, where certain patents had been taken for the price of \$2,500,000. in stock, the trial court held that the real question was whether the property was taken at a higher valuation than it was worth, *with a fraud-*

ulent purpose with the intent of evading the provisions of the statute, thereby placing the question of fraud upon the jury and not from the mere fact of knowledge of overvaluation. There the Court said that it would not be stated as a matter of law that the property transferred for the stock was not worth the nominal value of the stock or that the trustees did not believe that it was.

“The company at the time (of the transaction) having no debts and everyone assenting to the transaction, *there being no proof of fraud*, it is legal and creditors cannot enforce liability.”

Bruner v. Brown, 139 Ind., 600.

“Fraud must be charged and proved.”

Clow v. Brown, 31 N. E. (Ind., 361).

“This right is one existing not in favor of all creditors of a corporation, but in favor of a particular class only, viz., those *creditors who were defrauded by said transaction.*”

Great Western etc. Co. v. Harris, 128 Fed., 321 (affirmed 128 U. S., 561).

“Stock given as a bonus to a person loaning money to a corporation does not render the holder liable thereon, *he never having subscribed for it*

nor agreed to pay for it, and there being no proof that any creditor was injured by the transaction."

Taylor v. Walker, 117 Fed., 737 (affd. 127 Fed., 108).

"Creditors trying to hold stockholders liable must show that they *became creditors on the faith that the stock was paid up.*"

Taylor v. Walker, supra, 117 Fed., 737 (affd. 127 Fed., 108).

There was no attempt to show, as alleged in the petition, any representations that the stock was fully paid up or that any one or more of the creditors relied upon such a condition in rendering credit to the corporation.

"Where a creditor of a corporation rendered services sued for without investigating the corporation's financial condition and did not rely on the fact that the stock of the corporation was fully paid, he was not entitled to enforce a statutory stockholders' liability for debts on the ground that the stockholders' subscription had been paid by a transfer of the property at an excessive valuation."

McBride v. Farrington, 131 Fed., 797 (affirmed 149 Fed., 114).

"Creditors of an insolvent corporation can not compel holders of fully paid up stock to pay the difference between its par value and the value of

property conveyed in payment of it, in the absence of fraud in the valuation of the property.”

Graves v. Brooks, 11 Mich., 424, 75 N. W., 932.

“The fact that property purchased by a corporation with stock at its par value is taken at an overvaluation will not make the holder of such stock liable as for unpaid subscription until the transaction has first been impeached for fraud on the corporation.”

Merchants & Mechanics Savings Bank v. Coke Co., 51 West Virginia, 60, 41 S. E., 390.

Courts will treat as payment that which the parties have agreed should be such.

The contract made in this instance between the Phoenix Hardware Company and the appellants was not disadvantageous to the corporation. It had no assets. It had no subscriptions to stock. Its stock had no real or market value. The appellants chose to give it some value by turning over \$20,000 worth of merchandise referred to, receiving in payment therefor the 500 shares of stock.

Are corporations to be controlled by any other rules than those controlling individuals in the making of their contracts? Are the courts to say to these appellants, “It is true you never subscribed for any stock. While it is true you turned over all this merchandise to the Phoenix Hardware Company, worth

in the neighborhood of \$20,000, agreeing to sell the same for the 500 shares of the stock of the company, and the company agreed to purchase this merchandise and issue you all its stock for the same and did so," yet, after the contract has been in effect seven years, say to these appellants, "that was not your contract—your contract was to pay \$50,000. for that stock, and you are liable for the difference between \$50,000 and the real valuation of that merchandise and must pay it." Can the Court go this far in this case, when it appears that the whole proceeding was done in good faith, with no intent to defraud or mislead and substitute a new contract for that entered into by the parties?

"A corporation may take in payment of its shares any property which it may lawfully purchase. Such a transaction is not *ultra vires* or void, but is valid and binding upon the original share takers and upon the corporation unless it is rescinded and set aside for fraud. While such a contract stands unimpeached, the courts *even where the rights of creditors are involved, will treat that as payment which the parties have agreed should be payment.*"

Sec. 1341, *Thompson's Liability of Stockholders.*

In the case of *Kroenert v. Johnston*, 19 Wash., 96, the Court say:

"Section 4262, Sec. 1. Ballinger's Code prescribes a liability upon the part of stockholders in

a corporation like this for the amounts subscribed by them. This relates to their contractual liability and *if there has been no subscription, there is no contract to pay the corporation or its creditors anything in cases where the shares of stock were originally issued as paid up.* This action is practically brought as or has resolved itself into one to enforce a contractual liability. . . . The fraud claimed bears more especially upon Johnston than upon the other defendants. The basis is that by subscribing for \$5000. of the stock he contracted to pay that amount to the corporation. The alleged fraud consisted in turning in the real estate for a greater sum than its actual value. The only charge of fraud that could obtain against the other defendants was in permitting this real estate to be accepted or in agreeing to accept it for the price stated. As we understand the facts there was no real subscribing by them for any part of the capital stock. In obtaining it from Johnston they assumed no part of his contractual liabilities to the corporation or to the creditors under our statutes. As against them the action can only be maintained on the ground of an actual intentional fraud upon subsequent creditors of the corporation and there was no proof of such; and we think the same result follows as to Johnston under the proofs. *There was no showing that the corporation was formed with the design to issue any paper or obligations to third parties or to put any such afloat upon the market or to incur any indebtedness at all.* This was found necessary in the later prosecution of the business. . . .

“Without setting forth the testimony the most favorable view proved for plaintiff is that there was an overvaluation of the real estate turned in as a partial payment, but that this was offered, agreed upon and accepted without any intention to defraud anyone; the corporation being formed for

a legitimate and useful purpose. *While the records of its proceedings were not fully kept, and no formal resolution accepting the real estate was shown as of record, it was amply proven that such was the agreement and the proof was admissible, although the records were deficient. The mere fact of overvaluation does not establish a fraud in law as against Johnston, or, in other words, render him liable to a subsequent creditor for the difference between the actual value and the agreed value upon his subscribed liability. . . .*"

The conditions of this case are strongly similar to the one at bar, being a creditor's bill to enforce a liability of stockholders on the ground that the stock held by them had not been paid for up to the par value.

The Court there further says:

" . . . Courts, even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be a payment. This seems to us to be the more reasonable and equitable rule and sustained by the greater weight of authority. There is no hardship in requiring a party who contemplates having dealings with a corporation, or of purchasing its outstanding obligations, to acquaint himself with the actual property it has. The fact that it was incorporated with a certain amount of capital stock, should make no difference in the absence of a fraudulent dishonest purpose, as if organized for the object of issuing and floating its obligations with an apparently real but actually only a fictitious value. A knowledge of the amount of its designated capital stock would afford little or no criterion to determine the amount of its assets if it had been fully paid in money. Its capital might be lost or

impaired through legitimate business transactions and it would be just as reasonable to hold that it would be a fraud on creditors if it was not kept good and up to the stated amount."

It was incumbent on appellee to show that stock at time of transfer to appellants had a real or market value in excess of price paid.

The value of the fixtures and merchandise sold by appellants to the Phoenix Hardware Company had a real substantial value. It was worth over \$20,000 at wholesale, or from \$29,000 to \$30,000 at retail, as appears uncontradicted from the evidence, and the stock of the Phoenix Hardware Company at the time had no value, as there was no subscriptions and no assets (Tr., 50).

"Where the stock has no value when it is issued for property the creditors are not deprived of anything and cannot complain."

Cook on Corporations, Sec. 46, p. 124, Vol. I.

Where all the stock and a large quantity of bonds were issued by a railroad corporation to its contractor in payment for the construction of its road, the contractor is not liable to corporate creditors on the stock, even though the bonds without the stock were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real or market value.

Fogg v. Blair, supra.

In that case the U. S. Supreme Court say:

"If when disposed of by the railroad company, it was without value, no wrong was done to the creditors" (p. 126).

V.

However, if this Court should hold with the lower court that the transaction between appellants and the company whereby appellants obtained their stock must be treated as a subscription, the statute of limitations must bar a recovery from appellants of the so-called "unpaid balance." This becomes apparent at the close of petitioner's case. No evidence of actual or express fraud having been adduced, the transaction, if fraudulent at all, could only be so "in law." Therefore it cannot be urged that the "fraud" was not discovered until the happening of the insolvency of the company and that the statute of limitations did not commence to run until then, for, there being no actual fraud, the whole transaction was open and above board and fully apparent to anyone dealing with the company.

Section 711 of the Revised Laws of Arizona, 1913, provides:

"There shall be commenced and prosecuted within three years after the cause of action shall have occurred, . . . (1) Actions for debt where the indebtedness is not evidenced by a contract in writing. . . . (2) Actions for relief

on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Section 714 Id. prescribes:

"Action for debt, where the indebtedness is evidenced by or founded upon any contract in writing executed within this State, shall be commenced and prosecuted within four years after the cause of action shall have accrued and not afterward."

And so the "discovery of the fraud" having nothing to do with the time when the statute of limitations would commence to run, the only other circumstance which might prevent its running would be the failure of the company to issue a call for the unpaid balance of the subscription or an agreement between the company and the so-called "subscribers" that no call would ever be made. The evidence adduced by petitioner fails to show any such agreement, although alleged in the petition. Still, it might be said that there is no evidence so far to show any call by the corporation for the payment of the balance alleged to be due upon the subscriptions; but our contention is that the articles of incorporation themselves fix the time when subscriptions are due and payable, that is 30 days after stock has been subscribed for, and that therefore no call is necessary (Art. III, Tr. 85).

In the court below counsel for appellee laid great stress upon the opinion handed down by Mr. Justice

Woods in the case of *Scoville v. Thayer*, 105 U. S., 143; 26 Law Ed., 968, holding that the statute of limitations did not commence to run in that case until there was a demand for the payment of the balance of the subscription. We quote the following excerpts from that opinion:

“It is well settled that when stock is subscribed for *to be paid upon call* of the company, *and the company refuses or neglects to make the call*, a court of equity may itself make the call.”

“Under such circumstances before there is any obligation upon the stockholder to pay *without an assessment and call* by the company, there must be some order of a court of competent jurisdiction, or at the very least some authorized demand upon him for payment.”

“In this case there was no obligation resting upon the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment.”

It will thus be seen from the reasoning of this opinion that if there had been an obligation on the part of the stockholder to pay the balance of the subscription, antedating the time limited by the statute, that the determination of the *Scoville* case would have been that the action was barred. And so we say that that case is determinative of the question here. In the case at bar the obligation to pay the subscription, assuming that there was a subscription, is fixed and determined by the articles of in-

corporation—no further call or assessment was necessary to make the obligation complete—and in the absence of any fraudulent agreement between the company and the “subscriber” to relieve the subscriber from the obligation (fraudulent as against creditors), the obligation to pay remained in effect and binding upon the stockholder until released by the lapse of time, when it cannot be revived.

Further conceding that the trustee in bankruptcy takes the place of the corporation and would have power to levy a subscription assessment for the benefit of creditors, we submit that he would be subject also to the bar of the statute, if as contended the statute of limitations in this regard begins to run only from the adjudication of insolvency.

Section 2109 of the Revised Statutes of Arizona provides that:

“Nothing herein shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred to them for the purpose of defrauding creditors; and an execution against the corporation to that extent may be levied upon the private property of such individual or individuals.”

This while affirming the common law and declaratory thereof is a statutory liability. And Section 709 of the Revised Statutes of Arizona provides that “. . . an action upon a liability created by statute—other than a penalty or forfeiture,” shall be

commenced and prosecuted within one year after the cause of action shall have accrued.

The bankrupt corporation was adjudicated such on the 24th day of October, 1914 (Tr., 15), and the petition or complaint to recover said unpaid assessments was not filed until over a year later, to wit: on the 25th day of October, 1915 (Tr., 1-10).

So that even for argument sake, admitting liability on the alleged subscription, there was no authorized demand until after the bar of the statute had been interposed.

VI.

THE DEMURRER TO THE PETITION SHOULD HAVE BEEN SUSTAINED.

We rely upon the law as hereinbefore set forth in support of our contention that the demurrer to the petition should have been sustained (Assignment of Error I), and particularly call the Court's attention to the language used by Mr. Justice Harlan in the case of *Fogg v. Blair*, 139 U. S., 118; 35 Law Ed., 104.

“While it was competent for the St. Louis, Hannibal and Keokuk Railroad Company, exercising good faith, to use its bonds and stock in payment for the construction of its road, it could not rightfully, at least as against creditors or stockholders, issue its stock to Blair and Taylor as full paid, without getting some fair or reasonable equivalent for it. What was such an equivalent *depends*

primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them."

"It is averred in the bill, and the demurrer admitted, for the purposes of the hearing below, that full and adequate compensation for the work done by Blair and Taylor was \$12,000 per mile in the company's first mortgage bonds. Assuming this to be true, *if the stock issued to Blair and Taylor was of any considerable value at the time they received it, or if the circumstances attending its delivery to them indicated bad faith upon their part or upon the part of the corporation, different questions would arise from those now presented. But the bill contains no allegation whatever as to the real or market value of the stock.* If when disposed of by the railroad company it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit upon the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court—assuming such facts to be true—to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized. He seems to have carefully avoided making any allegation as to the real or probable value of the stock, *and to have supposed that the court, in the absence of averment or proof to the contrary, would assume that it was worth par, or had substantial value.* As he impugned the good faith of the transaction between the company and the contractors, it was incumbent upon him to state the essential, ultimate facts up-

on which his cause of action rested, and not content himself with charging generally, that what was done was 'colorable,' a 'fraud,' a 'breach of trust' and a 'scheme' by which Blair and Taylor were to get the stock without paying for it. These are *allegations of legal conclusions* merely, which a demurrer does not admit."

The allegations of the petition in the case at bar are so nearly similar in general terms to the allegations of the bill commented upon by the Court in the foregoing opinion that it seems unnecessary for us to add anything to such comments in support of our contention that the demurrer should be sustained. We therefore submit it without further comment.

VII.

The Court erred in amending the orders and decrees of the referee so as to make the obligation created by said orders joint and several instead of several.

Assuming *pro argumenti* that there was a stock subscription by appellants in this case, which we deny, the liability, if any, created thereby was an individual one and not joint and several.

Section 2109, Title 9, of the Revised Laws of Arizona, 1913, declares the common law liability of stockholders in ordinary corporations as follows:

"Nothing herein shall exempt the stockholders of any corporation from individual liability to the

amount of the unpaid installments on the stock owned by them or transferred to them for the purpose of defrauding creditors and an execution may be levied upon the private property of such individuals or individual."

By what process of reasoning the Court below arrived at the conclusion that the liability of appellants as found by the receiver was joint and several, is beyond our comprehension. If this be the law, then in an action to recover on a stockholder's liability for balance due on subscriptions to stock, every stockholder sued is, in addition to his liability to pay the amount due on his own contract of subscription, also liable to pay that of every other stockholder sued with him and against whom a judgment is obtained for unpaid stock subscriptions.

In this case if any one or more of these appellants is insolvent and unable to pay the amount found due on his alleged contract of subscription then the appellant who is able to pay must pay the alleged indebtedness of all who are so unable to pay. The mere statement of this proposition negatives it. The liability of these appellants assuming that the Court below was correct in holding them liable at all (which we deny) is not joint but is several, unequal and limited as to which each stands alone.

A judgment cannot therefore be rendered against the shareholders *jointly* to enforce this liability or against each *in solido* (10th Cyc., 679).

For the reasons given we submit that the order of the lower court affirming the orders and decrees of the referee should be reversed.

W. J. KINGSBURY,
JOSEPH S. JENCKES,
Attorneys for Appellants.

METSON, DREW & MACKENZIE,
and E. H. RYAN,
Of Counsel.

IN THE⁴
United States
Circuit Court of Appeals
For the Ninth District

IN THE
MATTER OF THE PHOENIX HARDWARE
COMPANY, A CORPORATION, BANKRUPT.

J. B. LONG, J. W. LONG, MAR-
GARET M. LONG, AND M.
WEST,

Appellants,

vs.

CHARLES B. CHRISTY, as Trus-
tee of the Estate of PHOENIX
HARDWARE COMPANY, a
corporation, Bankrupt,

Appellee.

Filed

SEP 27 1911

Brief of Appellee D. Monckton,
Clerk

J. C. FOREST,
Solicitor for Charles B. Christy, as Trustee
of the Estate of Phoenix Hardware
Company, Bankrupt, Appellee.

**UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH DISTRICT**
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HARDWARE COMPANY, a
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Appellee.

BRIEF OF APPELLEE

On Appeal From the United States District Court for
the District of Arizona

This is an appeal by J. B. Long, J. W. Long, Mar-
garet M. Long, and M. West from the orders and de-
crees of the United States District Court for the Dis-
trict of Arizona, dated March 3d, 1917, which orders
and decrees, after an amendment in an important
particular, affirmed the orders and decrees of the
Referee in Bankruptcy, dated March 15th, 1916.

Appellants have failed to file a brief herein, and

under sub-division 5, Rule 24, this appeal may be dismissed, but appellee does not move to dismiss for the reason:

FIRST: Appellee prays for an order and decree affirming the orders and decrees herein, as amended by the Judge of the District Court, on review, or if in the opinion of this Court the amendment of said orders and decrees was improvidently made, that then said orders and decrees be modified so as to conform to the original orders and decrees made by the Referee, and as so modified affirmed.

Phoenix Hardware Company was organized under the laws of Arizona in March, 1907, with a capital stock of \$50,000.00 divided in 500 shares, par value \$100.00 each, and conducted a general hardware and implement business at Phoenix, Arizona.

That on March 19th, 1907, the appellants (who are the only stockholders in said corporation), each subscribed for the following number of shares:

M. West.....	250 Shares
J. B. Long.....	130 Shares
J. W. Long.....	80 Shares
Margaret Long.....	40 Shares

and certificates as for full paid shares were issued to them.

On October 24th, 1914, Phoenix Hardware Company was adjudged a bankrupt, and on November 20th, 1914, Charles B. Christy qualified as Trustee of said bankrupt estate.

Claims aggregating \$5835.00 were filed and allowed against said estate and the Trustee, after disposing of all property of said estate, has in his hands \$377.94 applicable to the payment of these claims, also subject to the payment of costs, disbursements, commissions and counsel fees, and the referee estimates the costs, disbursements, commissions and counsel fees to be \$665.00 (R. p. 97).

On October 25th, 1915, the said Trustee filed a petition with the Referee in Bankruptcy, Fred A. Larson, alleging inter alia, that each of said subscribers had paid but 20 per cent of the par value of the stock in said corporation Bankrupt purchased by them, and no more, and praying for an order directing him to make an assessment and call upon the stock of said corporation, bankrupt, for the purpose of paying the debts of the Bankrupt (R. p. 1-10).

That a hearing was had on said petition, and such proceedings were had thereon, that, on the 15th day of March, 1916, the said Referee made and entered

an order and decree (R. p. 95-105), decreeing that each of said appellants are liable to the Trustee of said Bankrupt Estate in the sum of 33 per cent of the par value of the stock owned by them, less the amount paid thereon.

That upon petition for review, the case was certified to the District Judge, who, after amending the orders and decrees of the Referee to the effect that the liability was **joint and several, affirmed** the said orders and decrees as amended.

The Referee found as a matter of fact (R. p. 16), that appellants paid \$10,000.00 for the entire capital stock of said company, and with said sum the Phoenix Hardware Company, bankrupt, purchased a stock of goods from Arizona Hardware and Vehicle Company. The evidence sustains this finding (R. p. 52-53), (R. p. 91).

The Referee further found that 80 per cent of the par value, or \$80.00 per share of said stock remains unpaid (R. p. 16).

ASSIGNMENT OF ERRORS NOS. 1 AND 9.

The Bankruptcy Court may make assessment and call, and the proper practice in such cases is for the Trustee to file petition in the Bankruptcy Court for an order directing him to make an assessment and call upon the unpaid stock of the corporation for the

purpose of paying its debts. In order to determine whether such an order should be made, it is necessary for the Court to examine into and decide certain questions of fact, that is whether at the time of issue of any particular share, the full value was or was not paid in, whether any subsequent payments were made on account of it, whether the corporation was indebted in excess of the assets, and what is the amount of its indebtedness.

Scoville vs. Thayer, 105 U. S. 143, 26 L. Ed. 968.

1st Remington on Bankruptcy, Sec. 976 and 977.

ASSIGNMENT OF ERRORS NOS. 2, 4, AND 5.

Stockholders become such in several ways: Either by original subscription, or by assignment of prior holders, or by direct purchase from the Company.

Webster vs. Upton, Assignee, 91 U. S. 65, reading page 67.

Upton, Assignee, vs. Tribilcock, 91 U. S. 45.

Sanger vs. Upton, Assignee, 91 U. S. 56, reading page 63.

One who stands upon the books of the Company as a stockholder may be proceeded against for the recovery of any sum due upon the stock.

Sanger vs. Upton, Assignee, *supra*.

Paragraph 776 R. S. Arizona, 1901, reads as follows:

“Nothing herein shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred to them for the purpose of defrauding creditors; and an execution against the corporation to that extent may be levied upon the private property of such individual.”

Paragraph 2109 R. S. Arizona Civil Code, 1913, is substantially the same.

Where a corporation issues stock in payment for property, the property must be the fair equivalent in value of the par value of the stock issued therefor, otherwise the stockholder receiving it is liable to creditors who become such without knowledge of the fact, for the difference, whether he was guilty of actual fraud or acted in good faith; and, as a creditor dealing with a corporation had the right to rely on its having the full amount of its capital stock in money, or its equivalent value, in a suit to enforce such liability, the burden rests on the defendant to prove that plaintiff knew that it did not.

Babbitt vs. Read, 215 Fed. 395, affirmed
by (C. C. A.) 236 Fed. 42.

Van Cleve vs. Berkey, 143 Mo. 109; 44
S. W. 743.

While these cases rests to some extent on constitutional and statute law, the great weight of authority seems to be that, even in the absence of statutory law, unpaid subscriptions to the capital stock of a company is a **trust fund** for the benefit of the creditors of a corporation, and a trustee in bankruptcy may enforce collection of same.

Hatch vs. Dana, 101 U. S., 205.

Scoville vs. Thayer, *supra*, and cases
heretofore cited in 91 U. S.

The only expression of the Supreme Court of Arizona on any of the questions involved in this cause is found in the case of Stiles, Assignee, vs. Samaniego, 3d Arizona, 48; 20 Pac., 607.

The main proposition upon which reliance is had to reverse the decree of the Bankruptcy Court, is that a stockholder who has turned into the corporation property in payment of his stock, which has been accepted by the corporation as the equivalent of the face value of the stock, and who has not been guilty of actual fraud, cannot be called to account by creditors of the concern, or made to pay in satisfaction of debts the difference between the value of the property turned in and the par value of the

stock, and in support of this proposition the cases of Clark vs. Beaver, 139 U. S. 96; and Fogg vs. Blair, 139 U. S. 118, were cited by appellants in the Court below. These two cases, while they hold that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund sub modo for the benefit of its general creditors—they also hold a corporation may in good faith sell or dispose of its stock **to creditors in discharge of their debts** at less than par, where the corporation is financially embarrassed. These cases are not in point as the evidence clearly shows that at the time appellants purchased their stock the Phoenix Hardware Co., bankrupt, had no creditors. The case of Camden vs. Stuart, 144 U. S., 104; and Babbitt vs. Reed, 215 Fed. 395, affirmed on appeal by C. C. A., 236 Fed. 42, discuss these cases, and point out clearly their limitations and just what they intended to decide. In the case of Camden vs. Stuart, the Court, at pages 113 and 114, says:

“Nothing that was said in the recent case of Clark vs. Beaver, 139 U. S., 96; Fogg vs. Blair, 139 U. S. 118, or Handley vs. Stutz, 139 U. S. 417, was intended to over-rule or qualify in any way the wholesome principle adopted by this Court in the earlier cases, especially as applied to the original subscribers to stock.”

“The later cases were only intended to draw a line beyond which the Court was unwilling to go in affixing a liability on those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands.”

ASSIGNMENT OF ERROR NO. 3.

It is discretionary with the trustee as to whether book accounts shall be abandoned because not collectable.

1st Remington on Bankruptcy, Sec. 932-933.

Atchison, etc. R. R. Co. vs. Hurley, 153 Fed. 503.

Watson vs. Merrill, 136 Fed., 359.

In re Jersey Island Packing Co., 138 Fed., 625 (9th Circuit).

ASSIGNMENT OF ERROR NO. 6.

Assignment of Error No. 6 begs the question; but Courts will look to the substance rather than the shadow of a transaction.

While there is no book record of the stock transaction in this respect, the evidence shows (Transcript Record, Pg. 52-53), that the Phoenix Hardware Co. derived title of the stock of merchandise in question by bill of sale from Arizona Hardware & Vehicle Co. (R. p. 52-53), (R. p. 91). Now, whether or not the physical act of placing the money

in the treasury of the bankrupt company and the payment of it by Phoenix Hardware Co. to the Arizona Hardware & Vehicle Co. for the stock of goods, it is **in effect** what was done, as found by the referee. Even though the organization of the Phoenix Hardware Co. had not been perfected at the time of the stock transaction, appellants contemplated its organization (R. p. 91), perfected its organization, and it received and became the owner of the stock of merchandise by virtue of the bill of sale from the Arizona Hardware & Vehicle Co., and the particular manner in which the transaction was carried out cannot be successfully urged to defeat the well-established rule that "the capital stock of a corporation is a trust fund for the benefit of its creditors," and that property transferred to a corporation in payment for its stock must be the fair equivalent in value to the par value of the stock.

ASSIGNMENT OF ERROR NO. 7.

By their Assignment No. 7, appellants contend that the evidence does not show that at the time they purchased their stock the amounts paid thereon were credited to them, and the balance unpaid credited to discount, and the stock account between the company and themselves balanced by such discount. True there was no book record of such stock ac-

count, as the company kept no such account. But the evidence clearly shows that they purchased their stock at 20 per cent of its par value, and certificates as for full paid shares were issued and delivered to them, and whether there was any book account of the transaction or not, the very nature of the transaction shows clearly that the company must **in effect** have done just what the referee found it did do.

Scoville vs. Thayer, **supra**, reading page 144.

The general rule is that the findings of fact by a referee will not be disturbed by a judge unless they are clearly erroneous.

In re Covington, 110 Fed., 143.

In re Lefleche, 109 Fed., 307.

In re Stout, 109 Fed., 794.

ASSIGNMENT OF ERROR NO. 8.

In answer to Assignment of Error No. 8, the Court's attention is again directed to the case of Scoville vs. Thayer, **supra**, where, in speaking on the question of representation to the public that its stock was, or would be, fully paid, the Court, at page 154, said:

“It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders.”

“The creditor has, therefore, the right to

presume that the stock subscribed for has been, or will be paid up; and if it is not, a **Court of Equity** will, at his instance, require it to be paid."

"In this case the managers and agents of the bankrupt company had **in effect**, represented to the public that all its capital stock had been subscribed for, and had been, or would be, paid in full."

It is clear from the opinion last cited that it is not necessary that the managers and agents of the corporation must represent to each individual creditor dealing with it that its capital stock is paid in full before a creditor is warranted in indulging in the presumption that such stock has been so paid up; it is sufficient if the corporation has been as in this case, doing business with the public for years, under published and recorded articles of incorporation showing a capitalization of fifty thousand dollars.

Babbitt vs. Read (C. C.) 173 Fed., 712.

In re Remington Automobile and Motor Co., 153 Fed., 345.

ASSIGNMENT OF ERROR NO. 10.

The statute of limitation does not run against creditors' claims for unpaid subscriptions until a valid call is made by the directors, or by a court of competent jurisdiction, or some authorized demand is made upon the share-holders.

Scoville vs. Thayer, *supra*, reading page 153.

ASSIGNMENT OF ERROR NO. 11.

Upon petition for review the Judge of the District Court (upon the authority of *Babbitt vs. Read*, 215 Fed., 395, reading page 416, affirmed by C. C. A. 236 Fed. 42), amended the orders and decrees made by the Referee to the effect that the liability of appellants is **joint and several**.

Babbitt vs. Read, **supra**, is a case where the Trustee of a bankrupt estate brought suit against the stockholders to compel them to pay over to the Trustee a sufficient amount of money to pay the general creditors of the bankrupt corporation, on the grounds that the stockholders had not paid the par value of their stock, and ordered that a **joint and several** decree be entered against them (p. 416).

In the case of *Hatch vs. Dana*, 101 U. S., 205, Dana recovered a judgment against the Chicago Republican Company, and an execution having been returned nulla bona, Dana, on behalf of himself and other creditors, exhibited his bill in equity against the Company, Hatch, Williams and other stockholders, alleging inter alia, that 80 per cent of the par value of their stock had never been paid in to the Company, and while the Court held that the stockholders were liable for the unpaid subscriptions for

their stock, the liability was several only, and not joint and several .

Converse vs. Hamilton, 224 U. S., 240, seems to take the same view though but very little is said by the Court on this point.

Note to Thompson vs. Reno Savings Bank, 3rd Am. State Rep. 852, et seq.

ASSIGNMENT OF ERROR NO. 12.

Appellee submits that the facts found by the Referee, and the orders and decrees based thereon are fully supported by the evidence in this case (R. p. 24-81).

WHEREFORE, all things considered plaintiff and appellee pray this Honorable Court that the orders and decrees of the District Court for the District of Arizona made and entered on the 3rd day of March, 1917, be affirmed.

J. C. FOREST,
Solicitor for Charles B. Christy, as Trustee
of the Estate of Phoenix Hardware
Company, Bankrupt, Appellee.

IN THE ⁵
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of the PHOENIX HARDWARE COM-
PANY, a corporation, Bankrupt, J. B. LONG, J. W.
LONG, MARGARET M. LONG and M. WEST,
Appellants,

vs.

CHARLES B. CHRISTY as Trustee of the ESTATE
OF PHOENIX HARDWARE COMPANY, a cor-
poration, Bankrupt,
Appellee.

PETITION FOR REHEARING

W. J. KINGSBURY,
JOSEPH S. JENCKS,
Attorneys for Appellants.

METSON, DREW & MACKENZIE,
and E. H. RYAN,
Of Counsel.

FILED
APR - 1 1918
F. D. [unclear]
[unclear]

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of

PHOENIX HARDWARE COMPANY,

a corporation bankrupt,

J. B. LONG, J. W. LONG, MAR-

GARET M. LONG AND M. WEST,

Appellants.

vs.

CHARLES B. CHRISTY,

as Trustee of the Estate of Phoenix

Hardware Company, a corporation,

Bankrupt.

Appellee.

No. 3011

PETITION FOR REHEARING

Appellants respectfully petition the Court for a re-hearing of this cause and in support of their application urge:

I

That the Court erred in affirming the order of the District Court based upon the finding of the Referee

“that the said subscribers paid for the entire capital stock of said company the sum of Ten Thousand (\$10,000.00) Dollars, and with said sum the said Phoenix Hardware Company, by and through its duly authorized officers and agents, purchased a stock of goods from the Arizona Hardware and Vehicle Company and paid therefor the sum of Ten Thousand (\$10,000.00 Dollars.” Trans. Rec. p. 16.

It is upon this finding and the further finding that such payment of \$10,000.00 was all that had ever been paid for the entire capital stock of \$50,000.00 subscribed for, that the District Court and the Referee based their orders.

This Court has in its opinion rendered in this case correctly stated the facts with respect to the transaction whereby appellants obtained their stock in the Phoenix Hardware Company, viz.:

“Immediately prior to the organization of this company, a few days, perhaps, J. B. Long and M. West purchased a stock of goods from the Arizona Hardware and Vehicle Company, an insolvent concern, for the sum of Nine Thousand Nine Hundred Fifty (\$9,950.00) Dollars or near that figure, **the invoice value of which was about Twenty Thousand (\$20,000.00) Dollars.** (Bold type ours.) This stock was turned over to the Phoenix Hardware Company in consideration of the entire capital stock of the company. * * * * *” P. 2 of typewritten opinion.

Thus it appears that the true facts and the facts found by the Referee are at variance. This Court, notwithstanding, has held that whether or not appellants actually subscribed for their stock is, in view of the true facts, immaterial for the purpose of determining their liability to pay the full par value of the stock actually issued to them. We beg leave to urge, however, that, even though the Court's ruling be correct in this respect, appellants are entitled to have the order of the District Court and of the Referee modified to conform to the facts as they appear from the evidence and which this Court has found to be the true facts. The order of the Referee was based upon the fact as found by him (erroneously) that appellants paid but Ten Thousand (10,000.00) Dollars for their stock, while according to the true facts, as stated by this Court, appellants paid therefor a certain stock of merchandise "the invoice value of which was about Twenty Thousand (\$20,000.00) Dollars." The mere fact that appellants paid fifty cents on the dollar for such merchandise to an insolvent concern ought not to be determinative of its value. They might have paid nothing for it, and yet would be entitled to turn it in to the corporation at its fair market value; and the evidence is undisputed that its inventory value was its fair market value.

Let us assume that appellants received but two hundred shares of the capital stock of the company instead of five hundred shares, which would represent a par value of Twenty Thousand Dollars. Would they be liable as for an unpaid subscription to the ex-

tent of Ten Thousand (\$10,000) Dollars in such case? Assuredly not, the value of the property and the par value of the stock being equal. So here the appellants should be given credit upon their implied subscription for the full Twenty Thousand (\$20,000.00) Dollars instead of merely the Ten Thousand (\$10,000.00) Dollars allowed by the Referee. If the order of the Referee as entered herin and affirmed by this Court be allowed to stand, these appellants can be subjected to successive assessments aggregating together with the fair market value of the property turned over to the company, ten per cent more than the par value of the capital stock of the company held by them.

Appellants therefore respectfully request that a rehearing be granted in this cause, and if thereat this Honorable Court cannot consistently dismiss the same for the reasons as hereinafter urged, that at least the decree of the District Court affirming the order of the Referee herein be further modified to give appellants credit for the payment of Twenty Thousand (\$20,000.00) Dollars upon the capital stock held by them instead of but Ten Thousand (\$10,000.00) Dollars.

II

Appellants further respectfully urge that this Court erred in holding that the statute of limitations has not barred a recovery from them of the balance of the purchase price unpaid by them upon their stock at the time they received it.

This Court says, in its opinion :

“Balances due upon unpaid capital stock do not become due and payable until there has been a call or assessment.” P. 9 of typewritten opinion.

Such, without question, is the general rule, and is substantially the same as laid down in 10 Cyc. at page 484. It is equally true, on the other hand, that certain conditions exist which create exceptions to the general rule. For instance, as further stated in 10 Cyc. at page 485,

“No assessment is necessary * * * * where by the terms of his subscription he (the shareholder) has agreed to pay the amount subscribed by him at certain specified dates * * * *. Nor as a general rule are an assessment and call necessary to a right of action where the corporation has ceased to be a going concern and has gone into liquidation in any form * * * *. It is equally obvious that the governing statute or contract of subscription may be such that the whole amount subscribed for will be presently due and payable without the necessity of any formal call, or even of any demand for the whole or any part of it by the directors.”

That the case at bar falls within the exception is apparent from an examination of the record, for by the terms of the Articles of Incorporation of the Phoenix Hardware Company “the whole amount (of the capital stock) subscribed for” became “present-

ly due and payable without the necessity of any formal call." Article III of such Articles of Incorporation reads:

"The amount of the capital stock authorized by this corporation is fifty thousand (\$50,000) dollars. It shall be divided into five hundred (500) shares and the par value of each share shall be one hundred dollars (\$100). The times when and the conditions upon which it shall be paid are as follows: **The whole thereof within (30) days after the same has been subscribed for,** (Bold type ours), provided that the Board of Directors of said Company may accept merchantable hardware at such prices as they may deem proper in part or full payment for any subscription to the stock of this corporation." Tr. Rec. P. 85.

The "governing statute" of the State of Arizona in effect at the time of the incorporation of the Phoenix Hardware Company provided:

"The articles of incorporation must contain:
 "* * * * * The amount of capital stock authorized and the time when and the conditions upon which it is to be paid in." Sec. 1, Act 88, Ariz. Session Laws, 1908.

The transaction by which these appellants acquired their stock took place on March 19, 1907. So according to the exception to the general rule concerning calls and assessments as set forth in Cyc.,

Supra, the entire unpaid balance owing by these appellants became due thirty days thereafter, or on April 18, 1907, without the necessity of any call or assessment by the company. Having been due and payable on that date, the statute of limitations must have commenced to run therefrom, and had long since elapsed when the Referee levied his assessment. The case of Scoville vs. Thayer mentioned in the opinion of this Court as controlling of this question here, does but lay down the general rule, and ought not to influence this Court to decide the question adversely to appellant's contention. In fact, the persuasive force of that case should be the other way. The court said in that case :

“In this case there was no obligation resting upon the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment.”

In the case at bar the time for payment was fixed by the Articles of Incorporation and the obligation to pay arose when that time arrived, viz., April 18, 1907.

Respectfully submitted,

W. J. KINGSBURY,
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Attorneys for Appellants.

METSON, DREW & MACKENZIE,
and E. H. RYAN,
Of Counsel.

United States
Circuit Court of Appeals⁶

For the Ninth Circuit.

Transcript of Record.

(IN SIX VOLUMES)

THE KOKE COMPANY OF AMERICA, THE SOUTHERN
KOKE COMPANY, LIMITED, THE KOKE COMPANY OF
TEXAS, THE KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,

Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,

Appellee.

VOLUME I.

(Pages 1 to 384, Inclusive.)

Upon Appeal from the United States District Court for the
District of Arizona.

Filed

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*In the United States District Court for the District
of Arizona.*

Bill of Complaint.

The Coca-Cola Company, a corporation duly organized and existing under and by virtue of the laws of the State of Georgia and a citizen of the State of Georgia, with its residence and principal place of business in the City of Atlanta in said State, brings this, its bill of complaint, against Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas. Each of said defendants is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona and each has its office and principal place of business in the City of Phoenix, Arizona, and each is a citizen of the State of Arizona and is a resident and inhabitant of the District of Arizona. The jurisdiction of this Court in this suit depends upon the following grounds, to wit:

(a) This suit is brought for injunction, preliminary and perpetual, an accounting of profits and assessment of damages against the defendants upon the ground of their joint and several infringements of the trademark of the plaintiff, "Coca-Cola" and for unfair competition on the part of the defendants.

(b) In this suit there is a controversy between citizens of different states, wherein the sum or value in controversy, to wit, the value of the trademark [1*] name "Coca-Cola" and trade insignia of

*Page-number appearing at foot of page of original certified Transcript of Record.

plaintiff for which protection is sought and the damages and injury thereto by the acts of defendants and the profits accruing to defendants by their infringing and fraudulent acts, exceeds exclusive of interest and costs, the sum or value of Three Thousand Dollars.

(c) This suit is also brought upon the ground of the joint and several infringement by the defendants in commerce conducted among the several states of the United States of the trademark "Coca-Cola" of the plaintiff, duly registered under the Act of Congress of March 3d, 1881, in the United States Patent Office on June 6th, 1887, by J. S. Pemberton, a predecessor of plaintiff, and duly registered by the plaintiff in the Patent Office of the United States, under and by virtue of the provisions of the Act of Congress of February 20, 1905, entitled "An Act to authorize the registration of trademarks used in commerce with foreign nations, among the several states of the United States or with the Indian tribes and to protect the same." Said registration relates to articles and merchandise of the same descriptive properties as the articles and merchandise upon and in connection with which the infringing mark and name used by the defendants is employed.

For its cause of action plaintiff states:

(1) That prior to the year 1886, J. S. Pemberton, of Atlanta, Georgia, began to make, according to a secret [2] formula, which is now the sole property of plaintiff, a syrup for the manufacture of a refreshing nonalcoholic beverage, and that prior to the year 1886 he adopted as the trademark therefor the

name "Coca-Cola," which was at the date of the adoption thereof, as aforesaid, in all respects new, original and distinctive and had never before been used. Said J. S. Pemberton thereupon, after use of said name "Coca-Cola" upon said syrup sold and shipped in commerce between the several states and with foreign nations, did, after application, statement and verification in due form, register and was granted a certificate of registration of said trademark name "Coca-Cola" on June 6th, 1887, as a trademark for said syrup under and by virtue of the provisions of the Act of Congress of March 3d, 1881. The said J. S. Pemberton continued alone to sell his product under the name "Coca-Cola" until about the 8th day of July, 1887, when he sold a two-thirds interest in said business to one, Lowndes, and one, Venable, and that the said Pemberton, Venable and Lowndes became and continued to be the sole and exclusive owners and proprietors of the said secret formula, business and goodwill and the trademarks connected therewith, and together continuously carried on said business until about December 14, 1887, when the said Venable and Lowndes duly sold, assigned and transferred to one Dozier and one Walker their whole interest in the said business and the goodwill thereof and in [3] all secrets, formulas, trademarks, trade names and labels used in connection with the said business, and that said Dozier, Walker and Pemberton continued to be the sole and exclusive owners and proprietors thereof and together continuously carried on said business until about the 14th day of April, 1888, when said Pemberton duly sold, assigned

and transferred all of his interest in the said secrets, formulas, business and the goodwill thereof and all trademarks and trade names used in connection therewith to Walker, Candler & Co., a copartnership composed of W. Walker, A. G. Candler and Joseph Jacobs, and that the said Walker, Candler & Co. and Dozier and said W. Walker, in his individual capacity, became and continued to be the sole and exclusive proprietors of said business and in the goodwill thereof and in all secrets, formulas, trademarks, trade names and labels used in connection with said business and together continuously carried on said business until about the 17th day of April, 1888, when said W. Walker and said Dozier duly sold, assigned and transferred to A. G. Candler one-half of their two-thirds interest in said business and in the goodwill thereof and in all secrets, formulas, trademarks, trade names and labels used in connection therewith, and that the said Walker and Dozier, A. G. Candler and Candler & Co. became and continued to be the sole and exclusive owners and proprietors of the said business and the goodwill thereof and of all formulas, trademarks, trade names and labels, and together continuously [4] carried on said business until about the 30th day of August, 1888, when the said W. Walker and the said Dozier sold, assigned and transferred to A. G. Candler all of their remaining interest in the said business and in the goodwill thereof and all formulas, trademarks, trade names and labels used in connection with the said business, and that the said Walker, Candler & Co., and A. G. Candler became and continued to be

the sole and exclusive owners and proprietors of the said business and the goodwill thereof and of all secrets, formulas, trademarks, trade names and labels used in connection therewith and together continuously carried on said business until on or about the 22d day of April, 1891, when the said Walker, Candler & Co. duly sold, assigned and transferred to Asa G. Candler (who is the same person as A. G. Candler above referred to) all of their right, title and interest in said business and in the goodwill thereof and any and all trademarks, trade names and labels used in connection therewith, and that the said Asa G. Candler became and continued to be the sole and exclusive owner and proprietor of said business and the goodwill thereof and of all trademarks, trade names and labels connected therewith, and continuously carried on said business until about the 22d day of February, 1892, when the said Asa G. Candler duly sold, assigned and transferred to plaintiff all of his right, title and interest in and to said business and in the goodwill thereof [5] and in all secrets, formulas, trademarks, trade names and labels used in connection therewith, and that plaintiff has since continued to be the sole and exclusive owner and proprietor of said business and the goodwill thereof and of all secrets, formulas, trademarks, trade names and labels and has continuously owned and conducted the said business, goodwill, secrets, formulas, and owned and used said trademarks, trade names and labels down to the present time and is now conducting and using the same. Said formula and process for the manufacture of said beverage styled "Coca-Cola"

was new and original and invented and discovered by said Pemberton and has at all times been kept and conserved by plaintiff, its predecessors and their employees as a trade and business formula, process and secret, and is now a secret formula and process and not known to the public or others than said plaintiff and its officers and employees and the predecessors of plaintiff.

(2) That continuously and without interruption plaintiff and its predecessors, during the period aforesaid from prior to 1886 to this date, have manufactured, marketed and sold syrups made under and in accordance with said secret formula and process to be used in making a tonic beverage and that since the inauguration of said business, prior to the year 1886 by plaintiff's predecessors, as alleged in the preceding paragraph, said name "Coca-Cola" has been continuously used as a trademark name for the products so made and sold by plaintiff and its said predecessors, which said [6] trademark name was at the date of its adoption by plaintiff's predecessors aforesaid, in all respects new, characteristic and distinctive and had never before been used. Said trademark name "Coca-Cola" was at the outset and always has been and is now, new, characteristic and distinctive and was adopted and has been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar products of others, and the said trademark name does now identify and distinguish the said product.

(3) Plaintiff further states that after it had become so vested with and entitled to the sole and ex-

clusive right to use the said trademark "Coca-Cola" and was the owner thereof as a trademark for syrups for the manufacture of beverages, plaintiff did, on April 22, 1905, under and by virtue of the Act of Congress, approved February 20, 1905, duly apply to the United States Patent Office for the registration of the said trademark "Coca-Cola" and thereupon did make the statement and declaration required by law for such registration and did show that said trademark had been used by plaintiff and its predecessors as a trademark for tonic beverages and syrups for the manufacture of such beverages in commerce among the several States of the United States and with foreign nations and the Indian tribes, and complied in all respects with the statute in that case made and provided and the regulations of the Commissioner of Patents, and thereupon, on the 31st day of October, 1905, registration of the said trademark "Coca-Cola" was duly allowed for tonic beverages and syrups for the manufacture of such beverages, and a [7] certificate of registration thereof was granted to plaintiff, dated October 31, 1905, and numbered 47,189, which said registration and the certificate thereof are still in full force and effect, wholly unrevoked and uncanceled. A copy of the certificate of such registration is hereto attached marked Exhibit "A."

And by virtue of the premises and by virtue of the said registration aforesaid, plaintiff is entitled to the sole and exclusive right, both generally, and specially in commerce among the several states, in foreign commerce and in commerce with the Indian tribes,

to use and employ the trademark name "Coca-Cola" or any like work as a trademark for and upon the said products and articles aforesaid, and upon merchandise of substantially the same descriptive properties and that such right of plaintiff has been generally acknowledged and acquiesced in by the trade and public.

(4) Plaintiff's product is in the form of a syrup for the manufacture of a refreshing nonalcoholic beverage, and is made by plaintiff and in some instances furnished to bottlers, who under authority from plaintiff and under the supervision and control of plaintiff add aerated water thereto, making an aerated beverage, which is then bottled and sold to dealers and consumers under a distinctive and identifying label and bottle bearing plaintiff's said trademark "Coca-Cola." Said syrup also is sold and supplied by plaintiff to soda dispensers and is by them, under the direction and instruction of plaintiff, mixed with water for consumption at soda-fountains. Plaintiff furnishes as a receptacle for its said syrup to soda [8] dispensers a distinctive and characteristic display dispensing bottle or decanter. Plaintiff's said trademark name "Coca-Cola" is used by it upon labels attached to the receptacles containing said syrup and upon labels attached to the bottles containing the aerated beverage made from plaintiff's said syrup and put out by bottlers authorized by plaintiff and has always been printed and displayed in a characteristic and distinctive style of lettering. Plaintiff's syrup has certain peculiarities of taste, color and appearance and is and long has been marketed

by plaintiff in barrels or kegs, painted with a particular share of red and readily distinguished by reason thereof, and marked with labels bearing conspicuously the trademark name "Coca-Cola," and that plaintiff's syrup has a characteristic and distinctive appearance due to the color thereof, which is arbitrary, unusual, unnecessary and was originally adopted and is now used as a means of distinguishing plaintiff's product from similar products of others, and that said color does in fact so identify and distinguish plaintiff's product in the mind of dealers, buyers, users and the public generally.

(5) Plaintiff's said product as dispensed to the public is a refreshing, nonalcoholic beverage, and is and has been very extensively advertised by plaintiff at an enormous expense and is well and favorably known throughout the United States, and the trademark name "Coca-Cola" as the name thereof has long possessed and now has a great value and plaintiff's product sold thereunder is a meritorious and valuable article of merchandise, [9] and that the said trademark name "Coca-Cola," the original and distinctive style of lettering used therefor, the said distinctive color, appearance and characteristics of the said syrup, the barrels or kegs in which the same is contained, distinctively colored red as aforesaid, the distinctive dispensing bottles or decanters and the distinctive and characteristic labels above referred to, and the distinctive bottles and labels containing the said aerated beverage made from plaintiff's syrup and put up in such bottles with said labels by and under the authority of plaintiff, each by itself and

all in combination, identify and distinguish plaintiff's said product and point exclusively to plaintiff as the origin thereof. Plaintiff has also and does use said trademark name "Coca-Cola" in the peculiar and distinctive style and colors on its stationery, letter-heads, bill-heads and envelopes, circulars and price-lists.

(6) That the defendant, Koke Company of America, is a corporation of the State of Arizona, and was organized about September 15, 1911, and thereafter proceeded, at the City of St. Louis, Missouri, through its agents, to manufacture an extract in unnecessary and deliberate imitation in color and appearance of plaintiff's "Coca-Cola" syrup, but different therefrom and greatly inferior thereto, and said extract is by said defendant, Koke Company of America, at St. Louis, placed in barrels deliberately and purposely colored a peculiar shade of red, in imitation of plaintiff's distinctively colored barrels. Said extract is designated by said defendant "Koke" and is sold and distributed by it [10] under the said name "Koke," which said name is a fraudulent and deliberate imitation of plaintiff's trademark name "Coca-Cola." That the defendant, Koke Company of America, sells and ships from the city of St. Louis the said imitative extract under the said imitated name and in said imitative barrels to the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas, each of which is a corporation of the State of Arizona, Southern Koke Company, Limited, operating and doing business in

the City of New Orleans and The Koke Company of Texas, operating and doing business in the city of Dallas, Texas. The said extract is by said last-named corporations, used as a basis for making a syrup for sale to soda-fountains and to bottlers, from which syrup an aerated beverage can be made and is made, which said syrup resembles the Coca-Cola syrup made by plaintiff, in color, taste and appearance, and which said syrup so made from said extract by the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas, is called and styled "Koke" and "Koke Syrup" and is put up in barrels, decanters and dispensing bottles, similar in shape, size and color to the barrels, decanters and dispensing bottles used by plaintiff for Coca-Cola syrup and marked with the word "Koke" in style similar to the style of Coca-Cola as used by plaintiff upon said receptacles and which said imitative syrup and the said beverage are by said defendants and dealers who purchase from them, sold, substituted and palmed off as and for Coca-Cola syrup and beverage, and [11] that said defendants, as a matter of fact, do sell, substitute and palm off the said syrup and extract as Coca-Cola and as and for plaintiff's said Coca-Cola syrup, and that the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas all actively connive at and participate in said fraud, substitution and deception.

(7) That the adoption and use by the said defendant Koke Company of America, of the word "Koke" began many years after plaintiff's said product, under the name of "Coca-Cola" had become widely and favorably known and said word "Koke" was adopted by said defendant Koke Company of America, and is being used by said defendants and the other defendants herein named for the purpose only of imitating plaintiff's said trademark name "Coca-Cola," and to take advantage of the reputation of and demand for plaintiff's product; that defendants deliberately and intentionally and without any need or necessity make said syrup "Koke" like the "Coca-Cola" syrup of plaintiff in color, taste and appearance and in order to enable use and substitution thereof as genuine "Coca-Cola" and the beverage made therefrom to be passed off as the genuine Coca-Cola beverage. That the form in which the word "Koke" is printed by defendants and applied to the product sold by them is in deliberate and designed imitation of the characteristic and distinctive form of plaintiff's manner of printing its trademark name "Coca-Cola"; that the defendants also use and employ the word "Koke" in style and colors like the style and colors of "Coca-Cola" as used by plaintiff upon stationery, circulars and price lists and [12] small signs supplied to retailers and advertisers; that the spurious product of defendant, Koke Company of America under the said name "Koke" has in the past and is now being sold, dispensed and passed off on the public as and for plaintiff's said product, by said other defendants and their vendees; that the use

by defendants of the name "Koke" has in fact deceived the public and is now deceiving the public into the belief that the said spurious product is the product of plaintiff; and that the said passing off and deception are effectuated by the use by said defendants of said infringing name "Koke," which said name is a deceptive imitation in sound, appearance and suggestion of plaintiff's said trademark name "Coca-Cola" and is designed as such, and said deception is aided by the fact that said syrup "Koke" is placed by said defendants in barrels colored red in imitation of plaintiff's distinctive barrels and so furnished both to soda-fountain stands and dispensers and to bottlers for manufacture into an aerated beverage styled "Koke," and that said defendants have applied to aerated products put up under their alleged authority and made from the syrup "Koke" produced by said Koke Company of America, labels in imitation of plaintiff's distinctive labels upon the aerated "Coca-Cola" made by both plaintiff and authorized bottlers from genuine Coca-Cola syrup, and that the syrup product of said Koke Company of America styled "Koke" is unnecessarily and fraudulently colored in imitation of the distinctive color of plaintiff's product. Said defendants also furnish to soda dispensers bottles or decanters in deliberate imitation of plaintiff's distinctive dispensing bottles or decanters. [13]

Exhibit "B" hereto is a photograph which shows a bottle bearing plaintiff's label containing the aerated beverage produced under plaintiff's authority from genuine Coca-Cola syrup, side by side with

a bottle containing an aerated product made from the syrup "Koke" put up and labeled under alleged authority of defendant, Koke Company of America, by the defendant, Southern Koke Company, which is the Arizona corporation above named as the Southern Koke Company, Limited, defendant herein. Said bottled Koke bears a label in imitation of plaintiff's distinctive label and shows the deceptive word Koke printed thereon in said imitated type and form of lettering. Attached hereto as Exhibit "C" is a photograph of plaintiff's distinctive dispensing bottle or decanter and defendants' imitated dispensing bottle.

(8) Defendants state to both the bottlers and dispensers of "Koke" supplied as aforesaid with said false and imitative syrup "Koke" that said syrup is made under the same formula as "Coca-Cola" syrup and by one who is acquainted therewith and was at one time interested in said formula, all of which statements are false and known to defendants to be false and advise and instruct said bottlers of said aerated "Koke" syrup and retail purchasers of said aerated "Koke" and retail dealers buying and selling the same and also dispensers of "Koke" syrup to sell, substitute and palm off on buyers for use and consumption, asking for and intending to purchase genuine "Coca-Cola" made from the "Coca-Cola" syrup of plaintiff, said beverages made from said "Koke" syrup and said retailers and dispensers follow [14] said instructions and do by reason of the use of said name "Koke" in said imitative form and use of said imitative syrup, labels, signs and

receptacles, deceive buyers and users and substitute and palm off said "Koke" beverages as and for the genuine "Coca-Cola" beverages of plaintiff.

That it is the intention and design of the said defendants manufacturing and distributing said imitative and spurious "Koke" syrup and each of them by and through the use and employment of said word "Koke" the said spurious and imitative syrup and the aforesaid simulated receptacles, labels, styles, signs and devices adopted and employed in connection therewith, to enable retail dealers and dispensers who are supplied therewith thereby and therewith to substitute and pass off the spurious beverages made from said spurious syrup, in response to requests for and as the genuine Coca-Cola beverage; and that such substitution and passing off have been and are successfully and constantly accomplished by such retail dealers and dispensers and purchasers and consumers thereby deceived and defrauded. That it is also the intention and design of said defendants manufacturing and dispensing said imitative and spurious "Koke" syrup and of said defendant engaged in aerating and bottling the spurious beverage made therefrom, that through and by the use of the said word "Koke" the said imitative and spurious syrup and the aforesaid simulated receptacles, bottles, caps, styles, labels, signs and devices adopted and employed, as aforesaid, to enable retail dealers supplied with said aerated beverage put up in said bottles bearing said name "Koke" and dressed up in the fraudulent and deceptive style aforesaid thereby to substitute and pass off in response to inquiries for

the genuine "Coca-Cola" beverage [15] said spurious bottled aerated beverage, and that through and by the means aforesaid, said substitution and passing off have been and are systematically and constantly accomplished by such retail dealers and purchasers and consumers thereby deceived and defrauded.

Plaintiff, therefore, prays—

(1) That the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and the Koke Company of Arkansas, and each of them, be made parties defendant hereto, and that said defendants, and each of them, be required to answer each and every allegation herein, but not under oath, the answer of each of said defendants under oath being hereby waived.

(2) That a hearing may be had herein and the plaintiff's rights in the premises be established and adjudicated.

(3) That the said defendants, and each of them, their officers, servants, agents, employes, attorneys, licensees and assigns, and all acting by or under their authority, may be at first during the pendency of this suit and afterwards perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale or sale of any product not being the genuine product of the plaintiff the word "Coca-Cola" or any like word or the word "Koke" or any like word, or any word or name which in sound, appearance or suggestion is identical with or like the word "Coca-Cola" of the plaintiff, or the word "Koke";

from using or employing or authorizing the use or employment of labels, designs [16] or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices now used by the defendants; from using in connection with the sale or shipment any product, not the plaintiff's, barrels or receptacles colored in imitation of the plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by defendants or any of them is made from the same formula as Coca-Cola syrup or that defendants or any of them may rightfully use or employ the Coca-Cola formula; from coloring or otherwise contriving any product not the plaintiff's in such a way as to be calculated to induce the belief that the same is the plaintiff's and further, from doing any act or thing, or using any name or names, devices, artifices, or contrivances, which may be calculated to represent that any product not of plaintiff's production is the genuine "Coca-Cola" of plaintiff.

(4) That defendants and each of them may be required to account to plaintiff for any and all profits derived by them by reason of their unlawful conduct in the premises.

(5) That defendants may be required to pay to the plaintiff such damages as it may have sustained by reason of the defendants' unlawful conduct.

(6) That defendants may be required to pay the costs of this suit and that plaintiff may be decreed

such other and further relief as to the court may seem just.

(7) That process of this court issue directed to the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, the Koke Company of Oklahoma and the Koke Company of Arkansas, [17] and each of them, commanding them to be and appear before this Honorable Court at Phoenix, Arizona, on a day certain therein named, there to answer, make and abide the further order of the court.

THE COCA-COLA CO.,

CHAS H. CANDLER, V. P.,

Plaintiff.

J. E. MORRISON,

Solicitor for Plaintiff.

HAROLD HIRSCH,

FRANK F. ROGERS,

EDWARD S. ROGERS,

Of Counsel for Plaintiff. [18]

State of Georgia,

County of Fulton,—ss.

Charles H. Candler, being duly sworn, deposes and says that he is Vice-president of The Coca-Cola Company, plaintiff herein; that plaintiff is a corporation and affiant makes this affidavit and verification for it and in its behalf and is duly authorized so to do; that he has read the above and foregoing

Bill of Complaint and knows the contents thereof,
and that the same is true.

CHAS. H. CANDLER.

Sworn to and subscribed before me this 3d day of
March, 1914.

[Notarial Seal]

W. A. LANDERS.

Notary Public, Fulton County, Ga. [19]

UNITED STATES PATENT OFFICE.

THE COCA COLA COMPANY, OF ATLANTA, GEORGIA.

TRADE-MARK FOR TONIC BEVERAGES AND SYRUPS FOR THE MANUFACTURE OF SUCH BEVERAGES.

47,189.

Statement and Declaration.

Registered Oct. 31, 1905.

Application filed April 22, 1905. Serial No. 2,730

STATEMENT.

all whom it may concern.

It is known that THE COCA COLA COMPANY, a corporation duly organized under the laws of the State of Georgia, and located in the city of Atlanta, county of Fulton, in said State, and doing business at No. 179 Edgewood avenue, said city of Atlanta, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark of this corporation consists of the words "COCA-COLA."

This trade-mark has been continuously used in the business of said corporation and those in whom it derived its title since about the day of June, 1887.

The class of merchandise to which this trade-mark is appropriated is beverages, and the particular description of goods comprised in said class upon which this trade-mark is used is tonic beverages and syrups for the manufacture of such beverages.

The trade-mark is generally displayed on the packages containing the goods by placing thereon a printed label on which the same is shown and by printing or stamping the same thereon or by blowing the letters into the bottles or other containers of the goods.

THE COCA COLA COMPANY,
By ASA G. CANDLER,
Its President.

DECLARATION.

of Georgia, county of Fulton, ss:

ASA G. CANDLER being duly sworn deposes and says that he is the president of the corporation the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said mark is used by said corporation in commerce among the several States of the United States and all of said States, and between the United States and foreign nations, Indian tribes, and particularly between the United States and the Republics of Mexico

and Cuba, and with Canada and the five civilized tribes of Indians; that the description, drawing and specimens presented truly represent the mark sought to be registered; and that the mark has been in actual use as a trade-mark of the applicant for more than ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ASA G. CANDLER.

Subscribed and sworn to before me, Z. D. HARRISON, Clerk of the supreme court of the State of Georgia, this the 17th day of April, 1905.

[L. s.] Z. D. HARRISON.
Clerk of the Supreme Court of Georgia. [20]

EXHIBIT A.

TRADE-MARK.

No. 47,189.

REGISTERED OCT. 31, 1905.

THE COCA COLA COMPANY.

TONIC BEVERAGES AND SYRUPS FOR THE MANUFACTURE OF SUCH
BEVERAGES.

Application Filed Apr. 22, 1905.

Coca-Cola

PROPRIETOR
The Coca Cola Company
by Fred Beall
Attorney





[Endorsements]: No. E-21. United States District Court, District of Arizona. The Coca-Cola Company vs. Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas. Bill of Complaint. Filed Apr. 25, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. [24]

UNITED STATES OF AMERICA.

*District Court of the United States, District of
Arizona.*

IN EQUITY.

Subpoena ad Respondendum.

The President of the United States, Greeting: To Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States, District of Arizona, at the Courtroom in Phoenix, Arizona, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said Court by the Coca-Cola Company, a corporation duly organized and existing under and by virtue of the laws of the State of Georgia and a citizen of the State of Georgia, with its residence and principal place of business in the City of Atlanta, Georgia, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, this 25th day of April, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 138.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Robert E. L. Webb,

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES.

You are hereby required to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill may be taken pro confesso.

GEORGE W. LEWIS,

Clerk.

By Robert E. L. Webb,

Deputy Clerk. [25]

[Endorsed]: Marshal's Docket No. 395. No. E-21 (Phoenix). U. S. District Court, District of Arizona. In Equity. Coca-Cola Company, Plff., vs. Koke Company of America et al., Defts. Subpoena ad Respondendum. Filed Apr. 28, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy.

United States Marshal's Return.

Received this writ April 25, 1914, at Phoenix, Arizona, and executed the same April 27, 1914, at Phoenix, Arizona, by delivering a true copy hereof, together with a copy of the complaint filed herein, to Vernon L. Clark, Vernon L. Clark, personally, statutory agent of the Koke Company of America; to J. H. Langston, personally, statutory agent of the Southern Koke Company, Limited; Koke Company of Texas, Koke Company of Oklahoma; and to A. W. Cole, member of the Corporation Commission of Arizona, personally, in the office of the Corporation Commission at Phoenix, Arizona, for service upon the Koke Company of Arkansas, there being no officer or statutory agent of said Koke Company of Arkansas in Arizona.

Returned this 27th day of April, 1914, at Phoenix, Arizona.

J. P. DILLON,

U. S. Marshal.

By Chas. R. Price,

Deputy.

Marshal's fees for service, \$20.00

Amended Return.

Received this writ April 25, 1914, at Phoenix, Arizona, and executed the same April 27, 1914, at Phoenix, Arizona, by delivering a true copy hereof, together with a copy of the complaint filed herein, to Vernon L. Clark, personally, statutory agent of the Koke Company of America; to J. H. Langston personally, statutory agent of the Southern Koke

Company, Limited, Koke Company of Texas, Koke Company of Oklahoma; and to A. W. Cole, a member of the Corporation Commission of Arizona, personally, in the office of the corporation commission at Phoenix, Arizona, duplicate true copies of this writ and of the complaint filed herein, there being no officer or statutory agent of said Koke Company of Arkansas in Arizona.

Returned this 27th day of April, 1914, at Phoenix, Ariz.

J. P. DILLON,
U. S. Marshal.

By Chas. R. Price,
Deputy.

Marshal's fees for service, \$20.00.

*In the District Court of the United States for the
District of Arizona.*

No. E. 21—IN EQUITY.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF OKLAHOMA, THE
KOKE COMPANY, OF ARIZONA,

Defendants.

Answer.

To the Honorable, the Judge of the District Court
of the United States for the District of Arizona.

The joint and separate answer of the Koke Company of America, the Southern Koke Company, Ltd., the Koke Company of Texas, the Koke Company of Oklahoma, and the Koke Company of Arkansas, to the original bill filed against them in this court in the above-styled cause. [26]

Respondents for answer to said bill say:

They do not know whether or not the plaintiff is a corporation as alleged in the bill, or whether or not it is a citizen of the State of Georgia, but demand strict proof thereof.

2.

Respondents admit that the defendants, Koke Company of America, Southern Koke Company, Ltd., and the Koke Company of Texas, are corporations duly chartered as alleged in the bill. They admit that charters were taken out for the Koke Company of Arkansas and the Koke Company of Oklahoma, but said corporations were never organized under their said charters, and never transacted any business whatever, and are not now, and were not at the time of the filing of the bill in this cause, legally in existence, their charters having been abandoned. The principal place of business of the Koke Company of America is at St. Louis, Missouri; of the Southern Koke Company, Ltd., is at New Orleans, Louisiana; and of the Koke Company of Texas is at Dallas, Texas. None of the respondents, except the Koke Company of Texas, is selling the respondents' product "Koke" in any form, or in any kind of packages or receptacles anywhere in Arizona, nor is [27] any of

them, with the exception of the Koke Company of Texas, doing any of the acts alleged in the bill, or admitted or set up in the answer, within the District of Arizona, nor was any one of them, except said Koke Company of Texas, so doing at the time of the filing of the bill in this cause; nor has any of them, with the exception stated, done so at any time. There is, and was at the time of the filing of the bill in this cause, a suit pending in the United States District Court for the District of Missouri, Eastern Division, wherein the Coca-Cola Company, the plaintiff in this cause, is the plaintiff, and the Koke Company of America, one of the defendants in this cause, as well as James H. Van Duesen and J. C. Mayfield, Jr., are defendants; and there is, and was at the time of the filing of the bill in this cause, a suit pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division, wherein the Coca-Cola Company, the plaintiff in this cause, is the plaintiff, and the Southern Koke Company, Ltd., one of the defendants in this cause, as well as the Crecent City Seltz & Mineral Water Company, J. C. Mayfield and James L. Wright, are defendants; and there is, and was at the time of the filing of the bill in this cause, a suit pending in the United States District Court for the Northern District of Texas, Dallas Division, wherein the Coca-Cola Company, the plaintiff [28] in this cause, is the plaintiff, and the Koke Company of Texas one of the defendants in this cause, as well as George Bender, doing business as the Star Bottling Works, W. McCarty Moore, J. G. Von Winkle and

E. M. Boyd are defendants; that all of said suits involve identically the same cause of action as this suit does, the bill in this cause being substantially a copy of the bills in each of said causes; and the defendants, Koke Company of America, Southern Koke County, Ltd., and the Koke Company of Texas, plead and rely upon the pendency of said former suits as a complete defense to this suit.

3.

Respondents admit that about the year 1886, the J. S. Pemberton mentioned in the bill, began to make, according to a secret formula, a syrup for the manufacture of a refreshing, nonalcoholic beverage. They do not know whether or not the said Pemberton adopted the name "Coca-Cola" as a trademark, or trade name, for said syrup prior to the year 1886; but, for the purpose of putting that fact in issue, deny the same and demand strict proof thereof. They admit that in 1887, the said Pemberton had adopted the name "Coca-Cola Syrup," and was using it as a trademark for said syrup. They deny that the said Pemberton made any application, statement or verification for, or registered in the United States Patent Office, or was granted by the United States Commissioner of Patents, a certificate of registration of, the name "Coca-Cola," on or about June 6th or June [29] 28th, 1887, or at any other time, as a trademark for said syrup, under and by virtue of the provisions of the Act of Congress of March 3d, 1881. They admit that the said J. S. Pemberton continued alone to sell his said product under the name "Coca-Cola Syrup" until about the 8th day of July, 1887;

but they deny that on or about said date the said Pemberton sold a two-thirds interest, or any interest whatever, in said business to any one by the name of Lowndes or Venable, or to any one else. And they deny that after said date, the said Lowndes and Venable were associated with said Pemberton, or were joint or co-owners and proprietors with said Pemberton of the said secret formula, business, or goodwill, or any trademarks, trade names, or labels used in connection therewith. They deny that on or about the 14th day of December, 1887, or at any other time, the said Lowndes and Venable, or either of them, sold, assigned or transferred to any party or parties by the names of Dozier and Walker, or to any one else, any interest whatever in said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names, or labels used in connection therewith, or that the said Dozier and Walker, jointly with said Pemberton, were the sole and exclusive owners and proprietors thereof, or that said parties, together, continuously carried on said business until about the 14th day of April, 1888, or for any time whatever. They deny that on or about said last-named date the said Pemberton sold, assigned or transferred all, or any, of his interest, or any interest whatever, in said secrets, formulas, business or the goodwill thereof, or in [30] any trademarks, trade names or labels used in connection therewith to Walker, Candler & Co., or to anyone else. They deny that said Walker, Candler & Co., and Dozier, and Walker in his individual capacity, became, or continued to be the sole and exclusive proprietors of

said business, or the goodwill thereof, or of any of the secrets, formulas, trademarks, trade names, or labels used in connection therewith, or that they, together, continuously carried on said business until about the 17th day of April, 1888, or for any length of time whatever. Respondents deny that on or about said last-named date, or at any other time, the said Walker and Dozier, or either one of them, sold, assigned or transferred to A. G. Candler any interest whatever in said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names or labels used in connection therewith. They deny that the said Walker and Dozier, A. G. Candler and Candler & Company, became, or continued to be, the sole and exclusive owners and proprietors of said business, or of the goodwill thereof, or of any of the secrets, formulas, trademarks, trade names or labels used in connection therewith, or that they, together, continuously carried on said business until about the 30th of August, 1888, or for any length of time whatever. Respondents deny that the said Walker and Dozier, or either one of them, sold, assigned or transferred to A. G. Candler, all their alleged remaining interest, or any interest whatever, in said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names or labels used in connection therewith. Respondents [31] deny that the said Walker, Candler & Company, and A. G. Candler, or any of them, became, or continued to be, the sole and exclusive owners and proprietors of said business, or of the goodwill thereof, or of any of the secrets, formulas, trademarks, trade names or labels

used in connection therewith, or that they, together, continuously carried on said business until about the 22d day of April, 1891, or for any length of time whatever. They deny that the said Walker, Candler & Company sold, assigned or transferred to Asa G. Candler, or to any one else, any right, title or interest in or to said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names, or labels used in connection therewith, or that the said Asa G. Candler became, or continued to be, the sole and exclusive owner and proprietor of said business, or of the goodwill thereof, or of any of the secrets, formulas, trademarks, trade names or labels used in connection therewith; or that he continuously carried on said business, until about the 22d day of February, 1892, or for any length of time whatever. Respondents deny that the said A. G. Candler, sold, assigned or transferred to the plaintiff any right, title or interest in or to said business, or in the goodwill thereof, or in any of the secrets, formulas, trademarks, trade names or labels used in connection therewith, or that the plaintiff has since continued to be the sole and exclusive owner and proprietor thereof, or that it has continuously owned and conducted said business, goodwill, secrets, and formulas, or continuously owned and used any of the trademarks, trade names or labels [32] used in connection therewith, down to the present time, or that it now owns same, or is conducting said business.

4.

Respondents admit, however, that the plaintiff is now using the name "Coca-Cola," and labels bearing

said name, in connection with the extract, syrup and beverage which it is now manufacturing, marketing and selling. The adoption and use by plaintiff, or those through whom it claims of the name "Coca-Cola," and of the labels bearing said name, began subsequent to the adoption and use by respondents and their predecessors of their trademark name "Koke," and of labels bearing said name, and after respondents and their predecessors had begun to manufacture, market and sell their extract, syrup and beverage under said trademark name "Koke" in receptacles so labeled with said name. Respondents deny that the plaintiff is the legitimate successor in business of the said J. S. Pemberton, or the legitimate successor to, or owner of, the business and goodwill originally conducted by said Pemberton, or any of the secrets, formulas, trademarks, trade names or labels used in connection therewith.

5.

Respondents do not know whether or not the formula and process for the manufacturing of said extract, and syrup originally manufactured, marketed and sold by the said J. S. Pemberton, was new and original, or that it was invented or discovered by said Pemberton, but they demand strict proof of this allegation of the bill. [33]

6.

Respondents deny that the formula and process for the manufacturing of said extract, syrup and beverage, has at all times been kept and conserved by the plaintiff, or its predecessors, or their employees as a trade or business formula, process or secret, or that

it is now a secret formula, or process, or that it is not known to others than the plaintiff, its officers or employees, or the predecessors of plaintiff.

7.

Respondents would respectfully show the Court that in September or October, 1887, the said J. S. Pemberton was engaged in Atlanta, Georgia, in the business of manufacturing, marketing and selling various medicines, compounds, syrups, extracts and mixtures, known respectively as "French Wine Coca," "Globe Flower Cough Syrup"; "Indian Queen Hair Dye," "Gingerine" and "Coca-Cola Syrup"; that in September or October, 1887, the said J. S. Pemberton advertised in the "Atlanta Constitution," a newspaper published in Atlanta, Georgia, for a partner or partners, to join him in said business; that this advertisement was answered by the defendant, J. C. Mayfield, and by E. H. Bloodworth and A. O. Murphy; that thereupon the said J. C. Mayfield, E. H. Bloodworth and A. O. Murphy entered into a partnership with the said J. S. Pemberton for the purpose of carrying on and conducting said business; that articles of partnership were drawn up in writing, [34] and that, by the terms of said agreement, J. C. Mayfield, E. H. Bloodworth and A. O. Murphy, were each to pay into the said partnership \$2,000 in cash, and the said J. S. Pemberton was to sell and convey to each of said parties a one-fourth undivided interest in said business, including the formula and secret process for manufacturing said "Coca-Cola Syrup," and the business of manufacturing, marketing and selling the same, and

the goodwill thereof, and all the trademarks, trade names and labels used in connection therewith, the said J. S. Pemberton retaining a one-fourth undivided interest in the same; that in conformity with said agreement, the said J. C. Mayfield, E. H. Bloodworth and A. O. Murphy did each pay into the partnership said sum of Two Thousand Dollars in cash, and the said J. S. Pemberton, did, in fact, sell, assign, transfer and convey, by an instrument in writing, and in the manner required by the Act of Congress of March 3, 1881, to each of said parties, a one-fourth undivided interest in said business, including the business of manufacturing, marketing and selling said "Coca-Cola Syrup," and the goodwill thereof, and all the secrets, formulas, trademarks, trade names and labels used in connection therewith; that this occurred on or about the 14th day of January, 1888; that thereafter, the said J. S. Pemberton, A. O. Murphy, J. C. Mayfield and E. H. Bloodworth, as partners, doing business under the firm name and style of The Pemberton Medicine Company, continuously carried on said business aforesaid, and owned, manufactured, marketed and sold said products, including said "Coca-Cola syrup," and sold said "Coca-Cola Syrup" [35] under the trade name of "Coca-Cola Syrup," until about the 1st day of April, 1888, when the said J. S. Pemberton informed his said partners that he wanted to give the name "Coca-Cola Syrup" to his son, Charlie Pemberton. At that time the name "Coca-Cola Syrup" as applied to said extract or syrup, was not extensively known, and did not possess great value. The said J. S. Pemberton

represented to his said partners that, in as much as said business was practically in its infancy, and inasmuch as said name "Coca-Cola Syrup" was not extensively known, the name of the product which they were then manufacturing, marketing and selling under the name "Coca-Cola Syrup," could be as readily manufactured, marketed and sold under the name of "Koke," and that, if his said partners would agree to change the name of said product from "Coca-Cola Syrup" to "Koke," he would be enabled to humor his said son, and the business would not suffer by reason of the changing of the name. The said J. S. Pemberton was cranky, erratic and hard to get on with, and his partners realized that the business would progress more smoothly and harmoniously if they humored him in his whims and desires. Accordingly, on or about the first day of April, 1888, said partners agreed to change the name of their said product from "Coca-Cola Syrup" to that of "Koke," and to manufacture, market and sell it thereafter under the name of "Koke." Neither the said Mayfield, Murphy nor Bloodworth, however, agreed to any sale, assignment or transfer of any trademark in the name "Coca-Cola" or "Coca-Cola Syrup," or of any rights arising from the [36] registration in the United States Patent Office, of any labels bearing the name "Coca-Cola" or "Coca-Cola Syrup," or any interest in the business of manufacturing, marketing and selling said product, or in the goodwill thereof, or in any of the secrets, or formulas used in manufacturing the same, to said Pemberton's son, Charlie Pemberton, or to any one else. Respondents

do not know whether or not the said J. S. Pemberton attempted to sell, assign or transfer his interest, or any interest, in the name "Coca-Cola," or "Coca-Cola Syrup," or in any rights arising from any registration in the United States Patent Office of any label bearing said name, to his said son, Charlie Pemberton, but if he did, said attempt was ineffectual to accomplish the purpose intended, and did not confer any rights whatever upon the said Charlie Pemberton, because such sale, assignment or transfer, if any in fact was made, was not made in writing, and was not registered within the time, and in the manner required by law, and the rules and regulations of the United States Commissioner of Patents in the United States Patent Office, and was not made in connection with any sale of the business, or of the goodwill connected therewith.

8.

From and after about April 1st, 1888, the said Pemberton Medicine Company, the partnership composed of the partners aforesaid, began and continued to manufacture, market and sell, in interstate commerce, under the trade name of "Koke," in receptacles labeled with said trade name "Koke," [37] said identical product which they had theretofore manufactured, marketed and sold under the name of "Coca-Cola," or "Coca-Cola Syrup," until about the 11th day of June, 1888, when the said A. O. Murphy retired from the partnership. On said date articles of dissolution were drawn up by said partners, by the terms of which the said A. O. Murphy sold, assigned and transferred to the remaining partners all his in-

terest in said business, and in the goodwill thereof, including the business of manufacturing, marketing and selling said extract, syrup and beverage, theretofore known and sold under the name of "Coca-Cola," or "Coca-Cola Syrup," and "Koke" and all the secrets, formulas, trademarks, trade names and labels used in connection therewith. Thereupon, said remaining partners, J. S. Pemberton, J. C. Mayfield and E. H. Bloodworth, formed a partnership for the purpose of carrying on and continuing said business, and did carry on and continue the same, continuously and continuously manufactured, marketed and sold said product under said name of "Koke," in receptacles labeled with said trade name "Koke," until about the middle of July, 1888, when the said J. S. Pemberton died. Thereupon the said J. C. Mayfield and E. H. Bloodworth made a settlement with the widow and heirs of the said J. S. Pemberton, deceased, whereby the secret processes and formulas for making "Globe Flower Cough Syrup," "Indian Queen Hair Dye," and "Gingerine," together with the business and the goodwill thereof, and the trademarks, trade names and labels used in connection with said products, were transferred to said widow and heirs, and the said J. C. Mayfield and E. H. Bloodworth [38] retained the formulas and secret processes for making "French Wine Coca," and the "Coca-Cola" or "Koke" syrup aforesaid, and the business and goodwill thereof, and all trademarks, trade names and labels used in connection therewith. Thereupon the said J. C. Mayfield and E. H. Bloodworth, jointly and as partners, continued to manufacture, market and

sell said products, styled "French Wine Coca," and "Koke," and to market and sell the same under said names "French Wine Coca," and "Koke" respectively, in interstate commerce, in receptacles labeled with said names, until about 1893, when they sold the formula for making "French Wine Coca," and the business and goodwill, trademarks, trade names and labels, etc., connected therewith, to outside parties. Thereafter the said J. C. Mayfield and E. H. Bloodworth, jointly, as partners, continued to manufacture, market and sell in interstate commerce, in receptacles labeled with the name "Koke," said identical extract, syrup and beverage, which they had theretofore manufactured and sold under the names of "Coca-Cola" or "Coca-Cola Syrup," and "Koke," and continuously owned, manufactured, marketed and sold the same in interstate commerce, under the trade name of "Koke," in receptacles so labeled, until 1895, when the said J. C. Mayfield bought all of the interest of the said E. H. Bloodworth in said business, and in the goodwill thereof, and in all the secrets, formulas, trademarks, trade names and labels used in connection therewith. From and after said time the said J. C. Mayfield continuously owned, manufactured, marketed and sold said product [39] under the trademark name of "Koke" in interstate commerce, in receptacles labeled with said name "Koke" until about the 15th day of September, 1911, when the Koke Company of America, the corporation of that name mentioned in the original bill in this cause, was organized and chartered. On or about

said date, the said J. C. Mayfield sold, assigned and transferred to said Koke Company of America, said secret process and formula and all of his interest in said business, and the goodwill thereof, and all the trademarks, trade names and labels, used in connection therewith. From and since said date the said Koke Company of America became, and continued to be, the owner and proprietor of said business, and of the goodwill thereof, and all the secrets, formulas, trademarks, trade names and labels used in connection therewith, and continuously owned, manufactured, marketed and sold said product under the trademark name of "Koke" in interstate commerce, in receptacles labeled with said name "Koke," and continuously owned and used said trademarks, trade names and labels in connection therewith down to the present time, and said company now owns, and is the proprietor of said business and the goodwill thereof, and of all the secrets, formulas, trademarks, trade names, and labels used in connection therewith, and now owns and conducts said business.

9.

On or about the 22d day of October, 1912, said Koke Company of America granted to the defendant, The Southern [40] Koke Company, Ltd., a license to manufacture, market and sell said "Koke" syrup and to aerate and bottle the same and sell it in bottles within the State of Louisiana and various other states; and said defendant has since continuously, up to this time, manufactured, marketed and sold said "Koke" syrup under the trademark name of "Koke."

10.

On or about the — day of ———, said Koke Company of America, granted to the defendant, the Koke Company of Texas, a license to manufacture, market and sell said “Koke” syrup, and to aerate and bottle the same, and sell it in bottles within the State of Texas, and various other states; and said defendant has continuously up to this time manufactured, marketed and sold said “Koke” syrup under the trademark name of “Koke.”

11.

On the 10th day of November, 1898, W. L. Bitting of Sherman, Texas, after application, statement and verification in due form, deposited in the United States Patent Office a label entitled and bearing the name “Koke” in black letters, for registration, under and by authority of the provisions of the Act of Congress approved June 18th, 1874, entitled, “An Act to Amend the law relating to Patents, Trademarks, and Copyrights.” On the 27th day of December, 1898, said label was duly registered in the United States Patent Office in accordance with the provisions of said act, and the certificate of such registration was granted to the said Bitting by the United [41] States Commissioner of Patents, a copy of which said certificate is hereto attached and made a part of this answer, and is marked for identification Exhibit “A.” The original will be produced on or before the hearing. Said W. L. Bitting thereafter continuously used said label in interstate commerce, and in commerce with foreign nations and with the Indian Tribes upon receptacles containing

his said product until the 21st day of October, 1913.

12.

The said W. L. Bitting, after continuously using in interstate commerce and in commerce with foreign nations and with the Indian tribes, said name "Koke," as a trademark or trade name, for an extract, syrup or beverage similar to plaintiff's product, from about the 10th day of November, 1898, did, on the 21st day of August, 1911 duly file in the United States Patent Office an application to have said name registered under and by virtue of the provisions of the Act of Congress approved February 20th, 1905, and the amendments thereto of 1906, 1907 and 1909, as a trademark for his said product, after making in due form and filing in the United States Patent Office, the statement, declaration and verification required by law.

13.

On the 21st day of October, 1913, the said W. L. Bitting executed in writing, in the State of Texas, and acknowledged in the manner required by the laws of said state, an [42] assignment of said label "Koke" aforesaid, and the business of manufacturing, marketing and selling the product with which said label was used, and the good-will thereof, to the Koke Company of America, the corporation of that name mentioned in the original bill filed in this cause, and said assignment was duly recorded on the 28th day of October, 1913, in the office of the United States Commissioner of Patents as required by law. The said Bitting, also, in the same instrument, executed and acknowledged as aforesaid, sold and as-

signed to said Koke Company of America, said trademark name "Koke" together with the business of manufacturing, marketing and selling the product with which said name was used, and the goodwill thereof, and recorded the same on the 28th day of October, 1913, in the office of the United States Commissioner of Patents as required by said Trademark Act of 1905, and the amendments thereto. A copy of said assignment and the certificate of registration of the same is hereto attached, and made a part of this answer, marked for identification, Exhibit "B."

14.

Thereupon, after said assignment had been duly recorded in the United States Patent Office as aforesaid, said name "Koke" was duly registered as a trademark, and a certificate of registration of said trademark name "Koke" was duly granted by the United States Commissioner of Patents to said Koke Company of America, as the assignee of said W. L. Bitting, on the 13th day of January, 1914. A copy of said certificate of registration, together with a copy of the application, [43] statement, declaration and verification as made by said Bitting as aforesaid, is hereto attached and made a part of this answer, and marked Exhibit "C" to the same.

15.

The Murfreesboro Bottling Works, a corporation organized and existing under and by virtue of the laws of the State of Tennessee, after having previously used from May 1st, 1902, in interstate commerce, and in commerce with foreign nations and

among the Indian tribes, the name "Koke," in the identical script and style of lettering as said name is now used by the respondents, as a trademark for an extract, syrup and beverage similar to plaintiff's said product, on the 10th day of April, 1905, duly made and filed in the United States Patent Office and application to have said name "Koke," printed in said script and style of lettering registered as a trademark, and said Company, by its Secretary, J. W. Huggins, duly made and filed in said office the statement, declaration and verification required by law and said trademark was duly registered in the United States Patent Office, in the name of Murfreesboro Bottling Works, as a trademark on the 21st day of August, 1906, and on said date a certificate of such registration was granted to said Company by the United States Commissioner of Patents. A copy of said certificate is hereto attached and made a part of this answer, marked Exhibit "D" to the same. [44]

16.

Thereafter said corporation was dissolved and S. B. Christy, C. B. Huggins, J. W. Huggins and Christy & Huggins Company, a partnership composed of said S. B. Christy, C. B. Huggins and J. W. Huggins, who were the owners of all the capital stock of said corporation, succeeded to and became the owners of said trademark, and the business theretofore carried on by said corporation, and the goodwill thereof. Thereupon said parties formed a partnership for the purpose of owning and using said trademark and carrying on and conducting said

business, which said partnership was designated by them as the Murfreesboro Bottling Works. Thereupon, on the 28th day of November, 1911, said parties aforesaid, duly sold, assigned and transferred to the Koke Company of America, aforesaid, by an instrument in writing, duly executed and acknowledged according to the laws of the State of Tennessee, in which said assignment was made, said trademark name "Koke," written in said script and style of lettering aforesaid, and the said business theretofore conducted by them, and the goodwill thereof. Said assignment was duly filed and recorded in the United States Patent Office on the 12th day of December, 1911, and on said date a certificate certifying that fact was duly granted to said Koke Company of America by the United States Commissioner of Patents. A copy of said assignment and certificate is hereto attached and made a part of this answer, marked Exhibit "E" to the same. [45]

17.

On the 14th day of October, 1911, the Koke Company of America, after duly complying in all respects with the requirements of the laws of the Republic of Mexico, duly registered and was granted a certificate of such registration, of a trademark for the product now manufactured, marketed and sold by said Koke Company of America, and the defendants herein, under that name, consisting of the word "Koke" printed in the same script and style of lettering as it is now used and printed by said Koke Company of America, and the defendants herein and applied to their said product. A copy of said cer-

tificate is hereto attached and made a part of this answer, and is marked Exhibit "F" to the same.

18.

On the 12th day of April, 1913, said Koke Company of America, after fully complying in all respects with the laws of the Dominion of Canada, applicable thereto, duly registered, and was granted a certificate of such registration of said name "Koke" printed in the same script and style of lettering as it is now printed and used by said corporation and by the defendants herein as a trademark for the products which said Company and the respondents herein are now manufacturing, marketing and selling under said trademark name. A copy of said certificate of registration is hereto attached, and made a part of this answer, marked Exhibit "G" to the same. [46]

19.

Respondents deny that either the plaintiff or its predecessors, has, or have, continuously, and without interruption, during the period from prior to 1886 up to this time, manufactured marketed and sold said syrups made under and in accordance with the secret formula and process originally belonging to said J. S. Pemberton to be used in the making of a tonic, beverage, or under and in accordance with the formula and process which they are now using.

20.

Respondents deny that since prior to the year 1886, the name "Coca-Cola" has been continuously used as the trademark name for the products made and sold by the plaintiff or its predecessors. They

deny that the name "Coca-Cola" was at the outset, always has been, or is now, original, new, characteristic or distinctive.

21.

If the resemblance between the name "Coca-Cola" and respondents' trademark name "Koke" is so close as to be likely to cause confusion or deception in the minds of the public, or to deceive purchasers, which respondents deny, then, respondents deny that the name "Coca-Cola" was adopted, or has been used, for the purpose of distinguishing the product of the plaintiff and its predecessors from similar products of others, and they deny that said name does now identify or distinguish the plaintiff's said product. On the contrary, [47] the product of respondents was, prior to the adoption and use of the name "Coca-Cola" by the plaintiff, or its predecessors, and since continuously has been, owned, manufactured, marketed and sold by respondents and their predecessors under the name of "Koke."

22.

If the resemblance between said name "Coca-Cola" and the respondents' trademark name "Koke" is so close as to be likely to cause confusion or deception in the minds of the public, or to deceive purchasers, which respondents deny, then the statement and declaration which the plaintiff alleges it made on or about April 22d, 1905, in connection with its application to the Commissioner of Patents for the registration of said name "Coca-Cola" as a trademark, was false, and the registration of said name was fraudulently procured, because said state-

ment and declaration contained the false and fraudulent statement and representation that the plaintiff was the sole and exclusive owner of the trademark name "Coca-Cola," and was solely and exclusively using said name to distinguish its said product from the products of others, and that no other person, firm, corporation or association had the right to use, or was using said trademark, either in the identical form, or in such near resemblance thereto as might be calculated to deceive; and because said statement and declaration contained the false and fraudulent statement and representation that plaintiff's said product to which it applied said name "Coca-Cola" was a nonalcoholic beverage made from an extract of Coca leaves [48] and Cola nuts, and consequently, said name was improperly registered, and the registration thereof was invalid, and conferred no right upon the plaintiff to the use and protection of said name "Coca-Cola" as a trademark, as applied to plaintiff's said product, under and by virtue of the provisions of said act of February 20, 1905, inasmuch as the respondents, their predecessors and those through whom they claim, were at that time, and had been for many years prior thereto, the owners of, and using their said trademark name "Koke," and applying it to their said product, and inasmuch as plaintiff's said product "Coca-Cola" was not then, and is not now, a nonalcoholic beverage, nor was it then, nor is it now, made from an extract of Coca leaves and Cola nuts and inasmuch as W. L. Bitting, of Sherman, Texas, aforesaid, continuously used said name "Koke" as a trademark for products similar

to plaintiff's said product, in interstate and foreign commerce, and in commerce among the Indian tribes from about 1898 until October 21, 1913; and inasmuch as the Murfreesboro Bottling Works, continuously used said name "Koke" in the same script and style of lettering as the respondents now use it as a trademark for products similar to plaintiff's product in interstate and foreign commerce, and in commerce with the Indian tribes from May 1st, 1902, until the 28th day of November, 1911.

23.

Respondents are advised and charge that the alleged registration by plaintiff of said name "Coca-Cola" as aforesaid, under and by virtue of the provisions of the Act of Congress [49] approved February 20, 1905, was invalid, and conferred no right upon the plaintiff to the use or protection of said name "Coca-Cola" as a trademark as applied to plaintiff's said product; because, at the time of said alleged registration, said name "Coca-Cola" was descriptive of the goods with which it was used, and of the articles to which it was applied, and of the contents, ingredients, character and quality of the same; and because neither the plaintiff nor its predecessors was, or were, actually solely and exclusively using said name "Coca-Cola" as a trademark, nor had they, or any of them, solely and exclusively used said name as a trademark during any portion of the ten years next preceding the 20th of February, 1905, if in fact the resemblance between said name "Coca-Cola" and respondents' trademark name "Koke" is so close as to be likely to cause confusion

and deception in the minds of the public, or to deceive purchasers, which respondents deny, inasmuch as the respondents, their predecessors, and those through whom they claim had, during all of said time, owned and used their said trademark name "Koke" and applied it to their said product; and inasmuch as W. L. Bitting, of Sherman, Texas, aforesaid, continuously used, said name "Koke" as a trademark for products similar to plaintiff's said product in interstate and foreign commerce, and in commerce among the Indian Tribes, from about 1898 until October 21st, 1913; and inasmuch as the Murfreesboro Bottling Works, aforesaid, continuously used said name "Koke" in the same script and style of lettering as the respondents now use it, as a trademark for products similar to plaintiff's said product in interstate and foreign commerce, and in commerce with the Indian [50] Tribes, from May 1st, 1902, until the 28th day of November, 1911.

24.

Respondents are advised and charge that no suit can be maintained by the plaintiff under and by virtue of the provisions of said Trademark Act of February 20, 1905, for an infringement of said alleged trademark name "Coca-Cola," or for the protection of said name as a trademark; first, because said alleged trademark is, and was at the time of said alleged registration under said Act, used upon an article injurious in itself, in that the plaintiff's said product is, and was at the time of the said alleged registration, injurious and deleterious to health; and, second, because said alleged trademark

is, and was at the time of said alleged registration, used by plaintiff in an unlawful business; (1) in that the plaintiff's said product, "Coca-Cola," is misbranded within the meaning of section 8, sub-section one of the Food and Drugs Act of June 30th, 1906, because the plaintiff's said product is labeled and branded with the name "Coca-Cola," and said words "Coca-Cola," as thus employed, are a representation of the presence in said food product of the substances coca and cola nuts or at least of an extract derived from coca leaves and cola. There are substances known as Coca and Cola under their own distinctive names, or, at least, substances known as the Coca leaf and the Cola nut, under their own distinctive names, but plaintiff's food product "Coca-Cola" contains no Coca, and no Coca leaf, and no extract derived therefrom, and little, if any, Cola, or Cola nut, and little, if any, extract derived therefrom. Hence, [51] plaintiff's said product is, (a) an imitation of the articles or substances, Coca and Cola, or the Coca leaf and the Cola nut; and, (b) is offered for sale under the distinctive names of said articles. And plaintiff's said product is misbranded within the meaning of sub-sections two and four of section eight of the Food and Drugs Act of June 30th, 1906, (a), in that plaintiff labels the receptacles containing its said product with labels bearing thereon said name "Coca-Cola," and a pictorial design, or picture of Coca leaves and Cola nuts, which said design or picture, together with said name "Coca-Cola," are a representation that plaintiff's said product contains Coca and Cola, or

extracts derived from the Coca leaf and the Cola nut, when, in fact, it contains neither, or at least, no appreciable quantity of either; and, (b), in that plaintiff's said product so labeled with said labels, bearing said name "Coca-Cola" and said pictures of said Coca leaves and Cola nuts, is labeled or branded so as to deceive and mislead purchasers into the belief that its said product contains Coca and Cola, or extracts from the Coca leaf and the Cola nut, when, in fact, it does not, or at least, contains no appreciable quantity thereof. And said alleged trademark is used in unlawful business (2) in that, plaintiff's said product is adulterated, within the meaning of sub-sections 2, 3 and 5, of section 7 of said Food and Drugs Act of June 30, 1906, in that (a) the substance of Caffeine, derived from tea leaves, coffee beans and other sources, has been substituted for cola, or the cola nut, or extracts derived therefrom, and a twenty per cent solution of alcohol has been substituted for Coca or the Coca leaf, [52] or extracts derived therefrom; (b) in that all the substantial and valuable constituents of the said Coca and Cola, or of the said coca leaf and cola nut, have been wholly, or in part, extracted from plaintiff's said product; and (c), in that plaintiff's said product contains, as an added ingredient, a large quantity of caffeine, which is a poisonous substance, and which renders plaintiff's said product deleterious to health.

25.

If, in fact said name "Coca-Cola" was registered as a trademark in 1887, by J. S. Pemberton, as al-

leged in the bill under and by virtue of the provisions of the Act of Congress of March 3d, 1881, which respondents deny, then said alleged registration was invalid and conferred no right to the use and protection of said name as a trademark, under and by virtue of the provisions of said Act; because, at the time of said alleged registration said name "Coca-Cola," as at that time applied to the said J. S. Pemberton's product, was descriptive of the goods with which it was used and of the articles to which it was applied, and of the contents, ingredients, character and quality of such goods and articles, and because said alleged registration was procured by fraud, in that the said Pemberton falsely and fraudulently stated and represented to the Commissioner of Patents, in order to procure the registration of said name as a trademark, that said name was then used, and had been used prior thereto by him as a trademark for his said product in foreign commerce, and in commerce with the Indian Tribes when, in truth, and in fact, it was not then used, and had never [53] been used prior thereto, by him or anyone else, as a trademark for his said product in such commerce; and because, as a matter of fact, said name was not at the time of said alleged registration, and had never been prior thereto, used by said Pemberton, or anyone else, as a trademark for his said product in such commerce.

26.

If in fact the said J. S. Pemberton ever attempted to sell, assign, or transfer said alleged trademark, or

any interest therein, to the plaintiff, or any of its predecessors, or to those through whom it claims, which respondents deny, then said alleged sale, assignment or transfer was invalid and conferred no right upon said alleged vendees to the use or protection of said name "Coca-Cola," as a trademark; because, respondents charge upon information and belief, said alleged assignment or transfer was not made in writing, and was not acknowledged or recorded in the United States Patent Office as required by the provisions of said act, and the rules and regulations of the United States Commissioner of Patents in force at the time of said alleged assignment; and, because, said alleged assignment was not made in connection with the sale of the business and goodwill connected with said alleged trademark.

27.

Respondents charge, upon information and belief, that none of the alleged assignments of said alleged trademark [54] by the various alleged predecessors of plaintiff to their alleged successors, was made in writing and acknowledged and recorded in the United States Patent Office as required by the provisions of said act of March 3d, 1881, and the rules and regulations of the United States Commissioner of Patents in force at the time of said alleged assignments.

28.

Respondents deny that the plaintiff is the owner of any trademark in said name "Coca-Cola," or that it is entitled to the exclusive right, either generally

or specially, in interstate and foreign commerce, or in commerce with the Indian Tribes, to use and employ said name "Coca-Cola," or any like word, as a trademark for, or upon the plaintiff's said product, or upon merchandise of substantially the same descriptive properties, and they deny that any such alleged right has been generally acknowledged and acquiesced in by the trade and public.

29.

Respondents admit that plaintiff's product is in the form of a syrup for the manufacture of a refreshing beverage. They deny that plaintiff's said beverage is nonalcoholic. They suppose plaintiff's product is made up by, and, in some instances, furnished to, bottlers, who, under authority from plaintiff, and under the supervision and control of plaintiff, add aerated water thereto, making an aerated beverage which is then bottled and sold to dealers in bottles bearing said name [55] "Coca-Cola." But respondents deny that said aerated beverage is sold to dealers or consumers under a distinctive or identifying label-or bottle. The bottles used by plaintiff, as aforesaid, are neither distinctive nor identifying, either in color, shape, size, design or appearance, nor do they point exclusively to the plaintiff as the origin thereof. The plaintiff does not use exclusively, and its product is not put up exclusively in, bottles of any uniform color, shape, size, design or appearance. Various other similar products are bottled and sold in the market generally by the various manufacturers thereof, and dealers therein, in bottles of the same size, color, shape,

design and appearance as those in which plaintiff's product is bottled and sold; and were so bottled and sold by such various manufacturers and dealers in bottles of said size, color, shape, design and appearance, before, and at the time when, plaintiff, or its predecessors, began to bottle its said product in bottles of that kind, and since continuously have been, and are now. In fact, various other similar products are bottled and sold by and under authority of plaintiff in plaintiff's second-hand bottles bearing said name "Coca-Cola" blown thereon in the glass. Bottles of said size, color, shape, design and appearance were in general use by the manufacturers of, and dealers in, various other similar products, in the bottling of their said products, before, and at the time when, plaintiff, or its predecessors, adopted and began to use bottles of that character, and since continuously have been, and are now, in such general use. [56]

30.

Respondents admit that the name "Coca-Cola" is used by plaintiff upon labels attached to receptacles containing plaintiff's said syrup, and, in a few places here and there, upon labels attached to the bottles containing the aerated product made from plaintiff's said syrup. They deny, however, that said name has always been printed or displayed in a characteristic or distinctive style of lettering or that said style of lettering identifies or distinguishes plaintiff's product from similar products of others, or points exclusively to the plaintiff as the origin thereof. The style of lettering in which plaintiff

prints said name "Coca-Cola" upon labels attached to receptacles containing plaintiff's said product is not uniform, and has never been uniformly the same, but is now, and has always been, used in various different styles, sometimes in block letters, and in various other styles. The same style of lettering as that used by plaintiff, as aforesaid, was in general use in a similar manner by the manufacturers of, and dealers in, various other similar products upon labels attached to the receptacles containing their said products before, and at the time when, plaintiff or its predecessors, adopted and began to use said style of lettering, and has since continued to be, and is now, in such general use.

31.

Respondents admit that plaintiff's said syrup is [57] also sold and supplied to soda dispensers, and that it is by them mixed with water and sold for consumption at soda-fountains. They admit that in some instances plaintiff furnishes as receptacles for its said syrup, to soda-fountains and dispensers, dispensing bottles or decanters; but they deny that said dispensing bottles or decanters are distinctive or characteristic, or that they identify or distinguish plaintiff's said product from similar products of others, or point exclusively to the plaintiff as the origin thereof. Dispensing bottles, decanters and receptacles of the same color, shape, design, size and appearance, as those which plaintiff furnishes to soda-fountains and dispensers, and authorizes them to use, as receptacles for its said syrup, were in general use as receptacles for the various similar

products of others in the various soda-fountains and dispensing places throughout the country before, and at the time when, plaintiff or its predecessors, first adopted and began to use dispensing bottles, decanters and receptacles of such description, or to furnish them to soda-fountains and dispensers, and since continuously have been, and are now, in such general use. The plaintiff does not use, nor does it furnish to soda dispensers, or require them to use, dispensing bottles, decanters or receptacles of any uniform shape, size, design, color or appearance, but it furnishes to said soda-fountain dispensers, and its product is put up and exhibited to the public by them in dispensing bottles, decanters and receptacles of various different colors, shapes, sizes, designs and appearance, and the name "Coca-Cola" is printed thereon in various and different styles of lettering and colors. [58]

32.

Respondents deny that plaintiff's syrup has any peculiarity of taste, color or appearance, or any characteristic or distinctive appearance due to the color thereof, or that either the color, taste or appearance thereof, or all combined, is, or are, characteristic or distinctive, or identify or distinguish plaintiff's product from the similar products of others, or that any of them, or all combined, point exclusively to the plaintiff as the origin thereof. Various similar products, of various other manufacturers and dealers, of the same color and appearance as plaintiff's said product, were known and sold generally in the market before, and at the time when,

plaintiff, and its predecessors, began to manufacture, market and sell its said product, and have since continuously been, and are now, generally known and sold in the market. Before, and at the time when, plaintiff, and its predecessors, began to manufacture, market and sell their said product, respondents' product was known and sold in the market and possessed the same color, taste and appearance as it now does, and has ever since then been, and is now, known and sold in the market, and has always possessed, and now possesses, the same color, taste and appearance. Respondents do not know whether the color of plaintiff's product is arbitrary or unnecessary, and therefore deny that it is, and demand strict proof of that allegation. They deny that the color of plaintiff's product is unusual. They deny that the color or appearance of plaintiff's product was originally adopted, or that it is now used, as a means of distinguishing plaintiff's product [59] from similar products of others, and they deny that said color and appearance do, in fact so identify or distinguish plaintiff's said product in the minds of dealers, buyers, users or the general public.

33.

Respondents admit that the plaintiff is now marketing its syrup in barrels and kegs painted red, but they do not know how long plaintiff has been marketing its said product in barrels and kegs painted said color, except that they do know that respondents and their predecessors marketed their syrup in kegs and barrels painted red before, and at the time

when, the plaintiff and its predecessors began to so market its syrup, and have since continuously done so. They deny that the shade of red used by plaintiff in painting its said barrels and kegs is peculiar, or that it readily identifies or distinguishes plaintiff's barrels and kegs by reason thereof, or points exclusively to the plaintiff as the origin thereof. Respondents deny that the size, shape and design of plaintiff's barrels and kegs are characteristic or distinctive, or that they identify or distinguish plaintiff's said product from similar products of others, or point exclusively to the plaintiff as the origin thereof. Various other manufacturers of, and dealers in, similar products marketed their said products in barrels and kegs painted red, and substantially the same shade of red as plaintiff's barrels and kegs are now painted, and in barrels and kegs of the same size, shape and design as those in which plaintiff's product is now marketed, before and at the time when, plaintiff [60] and its predecessors began to so market its said product, and have since continuously done so, and are now doing so. Said color was in general use as a color for barrels and kegs containing products similar to plaintiff's and the size, shape and design of said barrels and kegs were in such general use, before, and at the time, when, plaintiff and its predecessors adopted and began to use said color, and barrels and kegs of said shape, design, size and appearance, and barrels and kegs of said color, shape, size, design and appearance, have since continued to be, and are now, in such general use.

34.

Respondents admit that the plaintiff's product, as dispensed to the public, is a refreshing beverage, and has been, and is, extensively advertised by plaintiff at an enormous expense, and that it is well known throughout the United States, but whether or not it is favorably known, respondents do not know, and therefore deny said allegation. Respondents suppose the name "Coca-Cola," as the name thereof, has for some time possessed, and now has, considerable value. They deny said product is a meritorious and valuable article of merchandise.

35.

Respondents deny that the name "Coca-Cola," or the style of lettering used therefor, or the color, appearance or characteristics of said syrup, or the barrels and kegs in which the same is contained, or the color thereof, or the dispensing bottles, decanters or labels above referred to, or the bottles [61] and labels containing said aerated beverage made from plaintiff's said syrup and put up in bottles with such labels by, or under authority of, plaintiff, each by itself, or all in combination, identify or distinguish plaintiff's said product from the similar products of others, or point exclusively to the plaintiff as the origin thereof.

36.

Respondents admit that plaintiff also uses said name "Coca-Cola" on its stationery, letter-heads, envelopes, circulars and price-lists, but deny that it is so used in any particular or distinctive style or colors. Plaintiff so uses said name sometimes in

block letters, and sometimes in script, and in various different styles, and sometimes in red, sometimes in black, sometimes in white, and in various different colors.

37.

Respondents admit that the defendant Koke Company of America is an Arizona Corporation, and was organized about September 15th, 1911, and thereafter proceeded at the City of St. Louis, Missouri, through its agents to manufacture an extract similar in color and appearance to plaintiff's "Coca-Cola" syrup and placed the same in barrels colored red.

38.

Respondents admit that the defendant, Koke Company of America, ships from St. Louis, Missouri, and the Southern Koke Company, Ltd., and the Koke Company of Texas, procure from it, [62] from St. Louis, Missouri, said extract, which is of substantially the same color and appearance as plaintiff's said extract and syrup, and that said extract is both by the Koke Company of America, and by the other defendants, Koke Company of Texas, and Southern Koke Company, Ltd., placed in barrels colored red. Respondents deny that the Koke Company of Oklahoma or the Koke Company of Arkansas, is doing any business whatever, and they deny that they are handling said extract, syrup or aerated beverage, known as "Koke," or dealing therein in any way, or performing any of the acts alleged in the bill. Said corporations were never organized after their charters were granted, and have never

transacted any business, and are not now legally in existence.

39.

The color of said extract, syrup and beverage, as made by the Koke Company of America, and the defendants herein, is not unnecessary or arbitrary, but the coloring matter used therein is an indispensable ingredient thereof, and has a pleasant acid taste, and gives a distinctive pleasing flavor to said extract, syrup and beverage. Said color fortifies the natural color of the other ingredients of said product, which, of themselves, are not sufficient to give an appetizing color to the same.

40.

Respondents do not know whether or not their said product is different from, or inferior to plaintiff's said product, [63] because they do not know precisely all the ingredients plaintiff now uses in said product, or the grade or quality thereof, and therefore deny and demand strict proof of this allegation.

41.

Respondents admit that their extract and syrup are, both by the Koke Company of America, and the other two defendants aforesaid, placed in barrels painted red, but they deny that their said barrels are purposely and deliberately so colored in imitation of plaintiff's said colored barrels. On the contrary, respondents and their predecessors have continuously, from the beginning, during the last twenty-eight years, painted red the kegs and barrels in which their said product was placed, and substantially the same shade of red as their said kegs

and barrels are now painted. The reason why respondents painted their said kegs and barrels said color, is, because they have all the time painted them said color; because Dr. Pemberton, and the predecessors of respondents, originally painted their kegs and barrels that color; because paint of the color which respondents use, and have used all the time, is about the cheapest paint on the market, and can be readily and cheaply mixed; and because it is the most suitable color for barrels and kegs, containing respondents' extracts, syrup or beverage. White would not be satisfactory because it would easily soil; green has a poisonous appearance; and yellow is sickening. Said kegs and barrels are placed by retail dealers and dispensers in the dark basements of their establishments, and, if they were painted any dark color, they could not be readily seen in the dark; hence, any dark color would be unsatisfactory and unsuitable, and would be objected to by [64] retail dealers and dispensers. The delicate shades of the lighter colors are more expensive than the cardinal colors, and so, on the whole, respondents have found the color they use, and have been using all the time, the most satisfactory, appropriate and desirable in every way. Besides, there is a natural abundance of the red mineral with which respondents' paint is made, and this mineral, when mixed with linseed oil, gives a paint cheaply and most suited to the kegs and barrels containing respondents' product. The paint used by the plaintiff on its said barrels and kegs contains a great deal of varnish, and when exposed to the weather, turns a milkish pink color, whereas respondents' paint is

mixed with linseed oil, and, when so exposed, retains the original bright red color.

42.

Respondents admit that their said extract is designated by said Koke Company of America, and by the defendants herein, Southern Koke Company, Ltd., and Koke Company of Texas, as "Koke," and is sold and distributed under said name by said defendants. They deny that said name is a fraudulent and deliberate imitation of plaintiff's said trademark name "Coca-Cola," is used by the plaintiff. Their said trademark name "Koke" is not only not an imitation of the name "Coca-Cola," but is nothing like the same. It is readily distinguishable therefrom in sound, appearance and suggestion, and is not a reproduction, counterfeit, copy or colorable imitation thereof. [65] in any respect. If, however, it should be held that the similarity between said names "Koke" and "Coca-Cola," is so close as to be likely to cause confusion or deception in the minds of the public, or to deceive purchasers, then, respondents charge that they, and their predecessors, adopted and used the name "Koke," and applied it to their said product, before, and at the time when, plaintiff and its predecessors adopted said name "Coco-Cola," and applied it to plaintiff's said product, and that respondents and their predecessors have since continuously so used and applied said name, and are now so using and applying it; and the plaintiff has no right, as against these defendants, to the exclusive use of the name "Coca-Cola."

43.

Respondents admit that the Koke Company of America, sells and ships from St. Louis, Missouri, the extract aforesaid, under the name of "Koke," in the barrels aforesaid which said extract is, by the defendants, used as a basis for making a syrup for sale of soda-fountains and to bottlers, from which syrup an aerated beverage can be, and is, made, and that said syrup resembles the "Coca-Cola" syrup made by plaintiff, in color, taste and appearance. Respondents admit that said syrup so made from said extract by defendants herein, is called and styled by them, "Koke" and "Koke Syrup," and is so known and sold in the market. Respondents do not know whether or not their said barrels are of the same size, shape, design and appearance as the barrels used by the plaintiff, but demand strict proof of that allegation. They do know, however, that [66] the barrels so used by them are of the standard sizes, shapes, designs and appearance, and are of the sizes, shapes, designs and appearance which are now, and for many years have been, in general use by the manufacturers of, and dealers in, similar products; and that respondents and their predecessors used barrels and kegs of substantially the same size, shape, design and appearance as they are now using, before, and at the time when, plaintiff and its predecessors began to use barrels and kegs of the size, shape, design and appearance as plaintiff is now using, and have since continuously used the same, and are now using them.

44.

Respondents deny that their said product "Koke" and "Koke Syrup" is put up in decanters. They admit, however, that their said product is put up in dispensing bottles, and plainly marked with the word "Koke," and that in some instances such dispensing bottles so used by the defendants may be similar in shape, size, color and design, to those used by the plaintiff for "Coco-Cola" syrup. However, dispensing bottles of said same size, shape, color and design are now in general use, as aforesaid, and were in such general use before, and at the time when, plaintiff and its predecessors began to use them. The soda-fountains where these dispensing bottles are used desire the dispensing bottles containing the various beverages which said fountains dispense to the public to be of uniform size, shape, color and design, so they will form an attractive setting to the soda-fountains and not offend the eyes of their [67] customers with odd sizes, shapes and designs, and glaringly dissimilar colors. Respondents admit that their said dispensing bottles, in which their said "Koke" or "Koke" syrup is put up, are plainly marked with the word "Koke," but they deny that said word "Koke" is similar in style to the words "Coca-Cola" as used by plaintiff upon its said dispensing bottles.

45.

Respondents deny that their said trademark name "Koke" as used by them upon their labels, and receptacles containing their said products, is similar to the style of script in which the words "Coca-

Cola” are likewise used by plaintiff. The words “Coca-Cola” as used by the plaintiff, are written in a flowing hand, slanting to the right, and the extensions of the capital “C” in the word “Coca” and of the capital “C” in the word “Cola” both extend to the right, and the letters in which said words are written are shaded heavily on one side and lightly on the other; whereas the word “Koke,” used by respondents, as aforesaid, is written in larger, thicker and heavier letters, without any shading, and is written in a backhand, slanting to the left, with the extension of the capital “K” extending to the right, under said word, and the extension of the small “e” curling back over the top of said word. There are various other distinctions between the style and script in which said words are written, which are readily distinguishable and discernable at a glance. The style and script in which said words are written are so unlike, and the general appearance of said words, as written is so dissimilar, that no one could [68] possibly be deceived thereby, or mistake the one for the other.

46.

Respondents deny that the color, shape, size, design or appearance of the bottles in which the respondents’ aerated product is bottled and sold by and under the authority of respondents, is similar to the size, shape, design, color or appearance of the bottles in which plaintiff’s said aerated product is so bottled and sold. The dissimilarity between the plaintiff’s and the respondents’ bottles is so glaring that no one could be deceived thereby, or mistake

those of the one for those of the other. Bottles of the same size, color, shape, design and appearance as those which respondents are now using were in general use by various other manufacturers of, and dealers in, similar products, in the bottling of their said products, at the time respondents and their predecessors began to use bottles of said description, and since continuously have been, and are now, in such general use. The respondents' aerated product is not put up in bottles of any uniform size, shape, color, design or appearance, but is put up in bottles of various colors, shapes, sizes, designs and appearance. The various bottlers throughout the country who put up and bottle respondents' aerated product use bottles of different sizes, colors, designs, shapes and appearance according to their fancy, just as do the various bottlers throughout the country who put up and bottle the plaintiff's said aerated product.

[69]

47.

Respondents admit that the shape and size of the labels and crowns used by them upon the bottles containing their said aerated product, and furnished by them to the various bottlers and dispensers of said product, are the same as to size and shape as the labels and crowns so used and furnished by the plaintiff, but the size and shape of said labels and crowns were in general use in the same manner as they are now used by plaintiff and respondents, by the manufacturers of, and dealers in, various other similar products, before, and at the time when, plaintiff and its predecessors first adopted and began to use labels

and crowns of said size and shape, and since continuously have been in such general use, and are now in such general use. Neither the size nor the shape of said labels or crowns identifies or distinguishes the plaintiff's product from similar products of others, or points exclusively to the plaintiff as the origin thereof. Respondents use the size of labels and crowns which they are now using because said size is the most appropriate and suitable to the size and character of bottles in which their said product is put up. Respondents use and furnish to their bottlers and dispensers labels of said diamond shape, because they can be more neatly, more readily, and more cheaply fastened to the bottles containing respondent's said aerated product than can be labels of any other shape. Respondents deny that the color, design or general appearance of their said labels is similar to the color, design and general appearance of plaintiff's labels. On the [70] other hand, respondents' said labels are so glaringly dissimilar to, and so readily distinguishable from, the plaintiff's labels, that no one could possibly be deceived thereby, or mistake the one for the other. While it is true that the caps or crowns of the bottles containing respondents' said aerated product are of a gray or silver color, with a red border, and the word "Koke" printed thereon in respondents' characteristic way and style of printing said work, nevertheless, the general appearance of said caps or crowns is so unlike those used on bottles containing plaintiff's said aerated product that no one could possibly mistake the one for the other, or be deceived

thereby. Besides, caps or crowns of said same colors and design were in general use upon bottles containing similar products of others before, and at the time, when, plaintiff and its predecessors first adopted and began to use caps or crowns of said colors and design, and since continuously have been, and are now, in such general use. Respondents deny that either the color, shape, size, design or appearance of the labels and caps or crown used by plaintiff or all combined, identify or distinguish plaintiff's product from similar products of others, or point exclusively to the plaintiff as the origin thereof.

48.

Respondents deny that their said products, "Koke" and "Koke" syrup, are, by the defendants or their vendees, sold, substituted or palmed off as and for plaintiff's "Coca-Cola" syrup [71] and beverage, or that the defendants, or their dealers, do, as a matter of fact, sell, substitute or palm off respondents' product as and for the product of the plaintiff. And they deny that all or any of them, actively connive at, or participate in, any such fraud, substitution or deception. They deny that the adoption and use by them and their predecessors of their said trademark name "Koke" began many years after the plaintiff's product, under the name "Coca-Cola," became widely and favorably known, or that said word "Koke" was adopted by them, or their predecessors, or by the Koke Company of America, for the purpose only of imitating plaintiff's said alleged trademark name "Coca-Cola," or to take

advantage of the reputation and demand for plaintiff's product, or that the use by the defendants herein of their said trademark name "Koke" was for the same and no other purpose. As hereinbefore stated, the adoption and use of said word "Koke" by the predecessors of defendants, and of the Koke Company of America, began about April 1st, 1888, before the plaintiff began to make its product, and before the plaintiff's product under the name of "Coca-Cola," became widely known, and the adoption and use of said name "Koke" was not for the purpose of imitating the name "Coca-Cola," but for the purpose of giving to the product of defendants and their predecessors an arbitrary and distinctive name, different from, and unlike, the name "Coca-Cola." Respondents deny that they deliberately and intentionally, and without any need or necessity, make their said syrup "Koke" like the "Coca-Cola" syrup of the plaintiff in color, taste and appearance, or that they do so in [72] order to enable them to substitute or palm off their said product as and for the plaintiff's "Coca-Cola" syrup and beverage. They deny that the form in which the said word "Koke" is printed by respondents and applied to their product is in deliberate and distinct imitation of the alleged characteristic or distinctive form of plaintiff's manner of printing its said name "Coca-Cola." Respondents deny that they use and employ the word "Koke" in style like the words "Coca-Cola" are used and employed by the plaintiff upon stationary, circulars, price-lists and small signs supplied to dealers, and advertisers. They admit, how-

ever, that they sometimes use said word in colors similar to the colors in which the words "Coca-Cola" are so used by plaintiff. But, plaintiff does not use said words in the manner aforesaid in any particular, characteristic, distinctive or uniform color, but uses it in various and diversified colors; and the colors in which said words are so used by plaintiff do not identify or distinguish plaintiff's product or point exclusively to the plaintiff as the origin thereof. Respondents deny that the use by them of the name "Koke" is in fact deceiving the public, or is now deceiving the public into the belief that respondents' product is the product of plaintiff; and respondents deny that their said product is being substituted and palmed off on the public by the defendants herein and their vendees as or for plaintiff's said product, or that said alleged passing off and deception are effectuated by the use by defendants of said name "Koke." Respondents deny that their said trademark name "Koke" is a deceptive imitation, either [73] in sound, appearance or suggestion, of plaintiff's alleged trademark name "Coca-Cola," or that it is designed as such, or that any deception is carried on or aided by the fact, or that any deception of the public is accomplished or aided by the character and appearance of the various receptacles in which respondents' product is put up, or by the labels used by respondent upon such receptacles, or by the color or appearance of respondents' said product.

49.

Respondents deny that Exhibit "B" to the original

bill in this cause, is a photograph of any label now used by respondents, or used by them at the time of the filing of the bill in this cause. The Southern Koke Company, Ltd., did use such a label several months ago in a limited territory, for a very short while, but as soon as it noticed the similarity between said label and plaintiff's label, it immediately changed the same, and has not used said label since. Respondents deny that said Exhibit "B," which is a mere photograph in black and white, correctly portrays the difference between the label which respondents are now using and were using at the time of the filing of the bill in this cause, and the labels used by plaintiff because, plaintiff's labels contain the words "Coca-Cola" printed thereon in blue, upon a gray background, and the words "Bottles Under Authority of the Coca-Cola Company, Atlanta, Georgia," and the facsimile signature of "Asa G. Candler, Pt.," appearing thereon, printed in black upon a white background; [74] whereas, respondents' said label contains the word "Koke" printed in red on a bright yellow background, and the words, "Bottled Under Authority of the Southern Koke Company, Ltd., New Orleans," or "Koke Company of Texas, Dallas," printed thereon in light blue on the same yellow background with no facsimile signature of any one on the same. Respondents attach hereto, as Exhibits "H" and "I," respectively, one of plaintiff's said labels, and one of respondents' said labels.

50.

Respondents admit that their said aerated "Koke" labeled as shown by Exhibit "I" hereto, is sold

throughout the City of New Orleans and elsewhere, by and under the authority of the Southern Koke Company, Ltd., and that said product bearing a similar label is sold throughout the city of Dallas, Texas, and elsewhere, by and under the authority of the Koke Company of Texas. The Koke Company of America, does not sell its products in bottles, at all. Respondents deny that their said product is by dealers sold, substituted or palmed off on the public as or for plaintiff's said product, bottled by or under authority of the plaintiff, and they deny that the public is thereby deceived or defrauded. They deny that any such alleged substitution is known to defendants, or intended by them, or effectuated by their said syrup, or the word "Koke," on their labels, or the labels, styles or receptacles used by them, or that any of them is a participant in any such fraudulent scheme of deceiving the public or injuring the plaintiff. [75]

51.

Respondents deny that all, or any of the defendants herein are, or is, engaged, together, in any deliberate scheme or plan to pirate upon the reputation of plaintiff's product "Coca-Cola," or to sell, substitute, or pass off respondent's said product "Koke," either as an extract or as an aerated beverage, as, or for, plaintiff's product "Coca-Cola"; or that any of said defendants is a participant in any such scheme, or jointly engaged therein.

52.

Respondents admit that they state to both the dealers, or dispensers, follow any such instructions, or

said, with their said syrup "Koke," that said syrup is made by substantially the same formula as "Coca-Cola Syrup" was originally made by J. S. Pemberton in Atlanta, Georgia, in 1886, '7 and '8, and that it is made by one who is acquainted therewith, and who was at that time interested in said formula, and these statements respondents stand ready to verify.

J. C. Mayfield was originally, as aforesaid, associated with the said J. S. Pemberton in the manufacture and sale of said Pemberton's "Coca-Cola Syrup," as hereinbefore stated, in 1888, and at that time became acquainted with said formula, and thoroughly learned to make said product according to the same, and by and under the direction of the said Pemberton, and he was the member of said firm, known as the Pemberton Medicine Company hereinbefore referred to, who actually manufactured and compounded said product for said partnership. Respondents [76] deny that they instruct the bottlers of their said aerated "Koke" syrup, or retail purchasers of said product, or retail dealers buying and selling the same, or dispensers of "Koke" syrup, to sell, substitute or palm off on buyers for use and consumption, asking for and intending to purchase "Coca-Cola" made from the "Coca-Cola" syrup of the plaintiff, respondents' said beverage made from their said "Koke" syrup; and they deny that any such retailers in, and dispensers of, "Koke," supplies as aforesaid that they have, by reason of the use of the name "Koke," in the form in which respondents use it, or the use of respondents' syrups, labels, signs or recep-

tacles, deceived buyers or users, or that they substitute or palm off respondents' said "Koke" beverage as and for the "Coca-Cola" beverage of plaintiff. On the contrary, respondents and their vendees are engaged in selling respondents' said product "Koke," under the trademark name of "Koke," upon its own merits and attractiveness, and not as the product of any one else, and they instruct their agents and employees and vendees not to attempt to substitute or palm off their said product for that of any one else, and their said agents, employees and vendees carry out their said instructions. Respondents deny that it is the intentional design of defendants manufacturing and distributing their said "Koke" syrup, or any of them, by and through the use and employment of their said trademark name "Koke," or their syrup, or their said receptacles, seals, signs or devices, adopted and employed by them in connection therewith, to enable retail dealers and dispensers who are supplied therewith, thereby, or therewith, to substitute or pass off respondents' [77] beverage made from respondents' said syrup, in response to requests for, or as, the plaintiff's beverage, or that any such substitution or passing off has been, or is, successfully or constantly accomplished by said retail dealers and dispensers, or that purchasers and consumers are thereby deceived and defrauded. Respondents deny that it is the intention or design of said defendants, manufacturing and dispensing their said "Koke" syrup, or of the defendants engaged in aerating and bottling the beverage made therefrom, through or by the use of their said trademark name "Koke," their

said syrup, or the aforesaid receptacles, bottles, caps, seals, labels, signs, or devices, adopted and employed by them as aforesaid to enable retail dealers supplied with their said aerated beverage, put up in said bottles bearing their said trademark name "Koke" thereby to substitute or pass off, in response to inquiries for plaintiff's beverage, or as, or for, plaintiff's said beverage, respondents' said bottles aerated beverage, or that by or through the means aforesaid any such substitution or passing off ever has been done, or is systematically and constantly accomplished by said retail dealers, or that purchasers and consumers are thereby deceived and defrauded. On the contrary, the respondents are engaged in advertising, marketing and selling their said product to the public upon its own merits, and they, and their predecessors, have been so engaged for the past twenty-seven or twenty-eight years. It is true the respondents' predecessors were not as wealthy, and did not have as much capital, as the plaintiff and its predecessors, and for that reason could not advertise [78] their product as extensively as the plaintiff and its predecessors have advertised their said product, but the business of the respondents has grown during all of said time little by little, until it has now reached out and spread throughout the length and breadth of the United States and into foreign countries. As long as respondents and their predecessors were doing a comparatively small business, the plaintiff made no objection to the same, and no attempt to drive them out of business, but now after years of patient toil and effort, when the respondents have caught up with

the plaintiff and now loom up as formidable competitors, the plaintiff has begun to attempt to stamp out their competition, and by every means in its power to drive them out of business. As a matter of fact, respondents charge upon information and belief, the plaintiff's predecessors got hold of respondents' secret formula and process for making their said product by bribing and corrupting the said J. S. Pemberton's wayward son, the said Charlie Pemberton, who had learned his father's formula, and because they had more capital than respondents' predecessors had, they were enabled, by enormously expensive advertising, to push their ill-gotten product to the front, and obscure the efforts and business of respondents' predecessors.

54.

The plaintiff and its predecessors have knowingly acquiesced for more than a quarter of a century in the use by respondents and their predecessors of their said trademark name "Koke," as applied by them to their said product, and respondents [79] charge that such acquiescence in such use of said name for said period constitutes such gross laches on the part of the plaintiff and its predecessors, as to bar the plaintiff now from any relief.

55.

For more than a quarter of a century respondents and their predecessors have spent their time, energy and money in building up their said business, and in establishing a reputation and demand for their said product under their said trademark name of "Koke," and during all of said time, the plaintiff and its pre-

decessors have stood by silently and permitted the respondents and their predecessors to so expend their said time and energy and large sums of money in so building up and establishing said business, and respondents are advised and charge that consequently the plaintiff and its predecessors are now estopped to question the right of respondents to carry on their said business, or to use their said trademark name "Koke." Respondents are advised and charge that by reason of said laches and estoppel aforesaid, said plaintiff is not entitled to the relief prayed for in the bill.

56.

Respondents are advised and charge that the plaintiff comes into court with unclean hands, and that it should be repelled from a court of equity,—that a court of equity will not assist the plaintiff to perpetrate a fraud [80] upon, and a deception of, the public by suppressing or enjoining alleged unfair competition in the perpetration of said fraud and deception. Plaintiff's said alleged trademark name "Coca-Cola" is a descriptive name, and produces the belief in the minds of the public, and in the minds of ordinary purchasers, that plaintiff's said product sold under said name is a beverage, the essentials or characteristic ingredients of which are derived from the Coca-leaf and the Cola nut, and the popularity of plaintiff's said product arises from the belief in the mind of the ordinary purchaser that he is buying a beverage, the essential or characteristic ingredients of which are derived from the Coca-leaf and the Cola nut; whereas, in fact, the said product contains none

of the essentials or characteristic ingredients of the Coca-leaf, and no appreciable quantity of any extract derived from said Coca-leaf, and said product contains very little, if any, of the essential or characteristic ingredients of the Cola nut, and no appreciable quantity of any extract derived from said Cola nut; but the essential or characteristic ingredients of said product, and those which characterize and distinguish it, and give it its color, taste, appearance and stimulating qualities are not derived from the Coca-leaf or the Cola nut, but are derived from a mixture of caramel coloring, sugar, water glycerine, phosphoric acid, lime juice, alcohol, and a large quantity of pure caffeine, derived from tea leaves and coffee beans, and other sources and not from the Cola nut. Said deceptive, fraudulent, misleading and falsely descriptive name "Coca-Cola" is applied by the plaintiff to its said product in selling and distributing [81] it to dealers and dispensers, and to the consuming public, and in the sale of said product in interstate commerce. Said deceptive, fraudulent, misleading and falsely descriptive name "Coca-Cola" is printed by the plaintiff upon labels affixed to the barrels and kegs, bottles, dispensing bottles, decanters, and receptacles containing plaintiff's said product, and is blown in the glass bottles in which said beverage is sold to the public, and is printed upon the caps and crowns of said bottles, and plaintiff's said product is by plaintiff extensively advertised on billboards, signs, cards and devices, in newspapers, periodicals and upon plaintiff's stationery, letterheads, billheads, price-lists, contracts, etc., under said

deceptive, fraudulent, misleading and falsely descriptive name of "Coca-Cola," and plaintiff labels its kegs, barrels and containers with labels bearing thereon pictures of Coca-leaves and Cola nuts, and this is deliberately done by plaintiff with the fraudulent intent and purpose of producing in the minds of the public the belief that the essential or characteristic ingredients of its said product are derived from the Coca-leaf and the Cola nut, and for the purpose and with the design of facilitating the perpetration of said fraud upon the public, and of assisting in carrying out said deception. Plaintiff advertises its said product as being a nonalcoholic beverage, and sells it to the public under labels bearing the false, deceptive, misleading and fraudulent statement and representation that it is a nonalcoholic beverage, when, as a matter of fact, a twenty per cent solution of alcohol is used by the plaintiff in the manufacture of its said product, and its said [82] product is in fact an alcoholic beverage.

57.

Respondents deny that any actionable damage has resulted to the plaintiff by reason of the conduct of respondents' business as aforesaid, or by reason of any of the acts of any of the defendants.

58.

Respondents are advised and charge that no action can be maintained by the plaintiff for any alleged infringement of any rights which may have accrued to the plaintiff or its predecessors, by reason of any registration of any label bearing said name "Coca-Cola," or "Coca-Cola Syrup," in the United States

Patent Office by the said J. S. Pemberton in 1887, or by anyone else; because, such cause of action, if any there be, accrued more than two years before the filing of the bill in this cause.

59.

Respondents deny each and every allegation in said bill not hereinbefore expressly admitted, denied, or explained, and now, having fully answered, pray that the injunction temporary and perpetual, prayed for in the bill may be disallowed, that judgment upon the merits may be rendered in their favor, and that they may be hence dismissed with their reasonable costs. [83]

KOKE COMPANY OF AMERICA,

By J. C. MAYFIELD,

Prest.

RICHARD E. SLOAN,

JAMES WESTERVELT,

Solicitors for Respondents.

SOUTHERN KOKE COMPANY, LTD.,

By J. C. MAYFIELD,

Prest.

KOKE COMPANY OF TEXAS,

By J. C. MAYFIELD,

Prest.

KOKE COMPANY OF OKLAHOMA,

By J. C. MAYFIELD,

JESSE M. LITTLETON,

CARLYLE S. LITTLETON.

KOKE COMPANY OF ARKANSAS,

By J. C. MAYFIELD,

One of the Incorporators,

Respondents.

AUGUSTINE B. LITTLETON,

Of Counsel for Defendants, Chatta-
nooga, Tenn.

JAMES WESTERVELT,

Of Counsel With Defendants, Phoenix,
Arizona.

(Seal of Koke Co. of America.)

(Seal of Southern Koke Co.)

(Seal of the Koke Co. of Texas.) [84]

United States of America,
Eastern District of Louisiana,
New Orleans Division,
State of Louisiana,
Parish of Orleans.

Comes J. C. Mayfield, who makes oath in due form of law that he is the president, respectively, of the defendant corporations, the Koke Company of America, the Southern Koke Company, Limited, and of The Koke Company of Texas and an Incorporator of The Koke Company of Arkansas; and that as such Presidents and Incorporator, respectively, he is peculiarly cognizant of the facts stated in the answer filed in the proceedings No. —, of the United States District Court for the District of Arizona, entitled "The Coca-Cola Company v. Koke Company of America, et als."; that the facts stated in said answer are true of his own knowledge, in substance

and in fact, except those stated to be upon information and belief, and as to those he verily believes them to be true and he hereto affixes the seals of said corporations as the president of each (except that of The Koke Company of Arkansas), having first been thereunto lawfully authorized, in further attestation of the truth of their answer.

J. C. MAYFIELD.

Sworn to and subscribed before me this 22d day of May, 1914.

[Notarial Seal]

EDW. RIGHTOR,

Notary Public, Appointed for Life.

(Seal of The Koke Co. of Texas.)

(Seal of the Koke Co. of America.)

(Seal of the Southern Koke Co., Ltd.)

(Seal of The Koke Co. of Texas.)

(Seal of the Koke Co. of America.)

(Seal of the Southern Koke Co., Ltd.)

[85]

United States of America,
Eastern District of Tennessee,
Southern Division.
State of Tennessee,
County of Hamilton.

Comes J. C. Mayfield, Jr., who makes oath in due form of law that he was one of the incorporators of the Koke Company of Oklahoma, and that as such incorporator he is acquainted with its affairs, and its history; that the facts stated in the foregoing answer, with reference to said Company are true in substance and in fact, and he makes this verification as an incorporator of said Company in its behalf.

J. C. MAYFIELD, Jr.

Sworn to and subscribed before me this 19th day of May, 1914.

[Notarial Seal]

C. S. COFFEY,
Notary Public.

My commission began on the 25th day of Jany., 1911, and expires on the 25th day of Jany., 1915.
[86]

Plaintiff's Exhibit "A"—Certificate of Registration of Label.

No. 6,752.

(2-166)

UNITED STATES OF AMERICA,
Patent Office.

Here ap-
pears
five
documen-
tary
2-cent
stamps—
across
face of
each is
written
1898 MB.

To wit: Be it remembered, That on the tenth day of November, anno Domini 1898, W. L. Bitting, of Sherman, Texas, deposited in this Office for registration a LABEL, of which the following is the title:

“KOKE”

(For a Chemical Compound)

the right whereof he claims as Sole proprietor, in conformity with the law of the United States entitled “An Act to amend the law relating to Patents, Trademarks, and Copyrights,” approved June 18, 1874.

IN TESTIMONY WHEREOF I have caused the seal of the Commissioner of Patents to be hereunto affixed this twenty-seventh day of December, 1898, and of the Independence of the United States the one hundred and twenty-third. Given under my hand at Washington, D. C.

The foregoing is a copy of the record, and attached hereto is a copy of said LABEL.

[United States Pat. Office Seal.]

C. H. DUELL,
Commissioner of Patents.

(On second page appears:)

.
Koke, W. L. Bitting, Druggists,
Sherman, Texas. [87]

**Plaintiff's Exhibit "B"—Assignment of Trademark
and Certificate of Registration.**

2-392.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

RECEIVED AND RECORDED on the 28th day of October, 1913, in Liber W, 93, page 24 of Transfer of Patents.

IN TESTIMONY WHEREOF, I have caused the seal of the Patent Office to be hereunto affixed.

[United States Patent Office Seal.]

THOMAS EWING,
Commissioner of Patents.

ASSIGNMENT OF TRADEMARK, ETC.

WHEREAS I, William L. Bitting, of Sherman, Grayson County, Texas, am the owner of a Label Registration No. 6,752, dated December 27, 1898, entitled "Koke," for use on a chemical compound, and also the owner of a certain trademark known as "Koke" as applied to and used on a certain nonalcoholic beverage, for the registration of which I filed

an application in the United States Patent Office on August 21, 1911, Serial No. 58,310;

AND WHEREAS, Koke Company of America, a corporation duly organized and existing under and by virtue of the laws of Arizona, is desirous of acquiring all of my right, title, and interest in and to the said registered Label No. 6,752, and in and to the said trademark "Koke" as applied to [88] a nonalcoholic beverage, and in and to the said application for the registration thereof, Serial No. 58,310, filed August 21, 1911, and in and to the goodwill of the business of manufacturing and selling said chemical compound, and said nonalcoholic beverage;

NOW, THEREFORE, To all whom it may concern, be it known that, for and in consideration of the Sum of Five Hundred Dollars, lawful money, the receipt whereof is hereby acknowledged, and for other valuable consideration, I, the said William L. Bitting, have sold and assigned, and by these presents do sell and assign to and unto the said Koke Company of America, its successors and assigns, all and several my right, title, and interest in and to the said Label Registration No. 6,752, dated December 27, 1898, entitled "Koke" and used on a chemical compound and all of my right, title, and interest in and to the said trademark "Koke" as applied to a nonalcoholic beverage, and in and said trademark application, Serial No. 58,310, filed August 21, 1911, for the registration of the same, and in and to the goodwill of the business of manufacturing and selling chemical compounds and said nonalcoholic beverage under the said trademark "Koke."

And the Commissioner of Patents is hereby authorized and requested to register the said trademark "Koke" to the aforesaid Koke Company of America its successors and assigns.

Signed at Sherman, Grayson County, Texas, this 19th day of May, 1913. [89]

WILLIAM L. BITTING.

State of Texas,
County of Grayson.—ss.

On this 21st day of October, 1913, before me, R. L. Brome, a notary public in and for the County of Grayson and State of Texas, came the above-named William L. Bitting, with whom I am personally acquainted, and personally known to me to be the person he represents himself to be, and being by me duly sworn, deposes and says that he signed, personally, the foregoing instrument, for the purposes therein set forth.

[Notary Seal]

T. L. BROME,
Notary Public.

My commission expires June 1, 1915. [90]

**Plaintiff's Exhibit "C"—Certificate of Registration
of Trademark.**

2-394.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To All Persons to Whom These Presents Shall
Come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this office of the Cer-

ificate of Registration, Statement, Declaration and
Drawing in the matter of the

Trademark

Registered by

William L. Bitting, Assignor to

Koke Company of America,

January 13, 1914,

Number 94,869,

for a

Nonalcoholic Fruit-Flavored Beverage of Certain
Named Ingredients.

The certificate of registration was granted for the
term of twenty years, and so far as is disclosed by
the records of this office, said certificate still in full
force and effect.

IN TESTIMONY WHEREOF I have hereunto
set my hand and caused the seal of the Patent Office
to be affixed at the City of Washington, this 1st day
of May, in the year of our Lord one thousand nine
hundred and fourteen and of the Independence of
the United States of America the one hundred and
thirty-eighth.

[Seal of U. S. Pat. Office.]

THOMAS EWING,

Commissioner of Patents. [91]

2-372

No. 94,869.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come:

This is to certify that by the records of the United

States Patent Office it appears that William L. Bitting,

of

Sherman, Texas,

did, on the 21st day of August, 1911, duly file in said Office an application for REGISTRATION of a certain

TRADEMARK

for a nonalcoholic fruit-flavored beverage of certain named ingredients.

He having assigned his right, title, and interest in said Trademark to Koke Company of America, a corporation of Arizona, that he duly filed therewith a drawing of the said TRADEMARK a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicant is entitled to registration of his said TRADEMARK has been duly REGISTERED to Koke Company of America, its successors or assigns, in the UNITED STATES PATENT OFFICE, this thirteenth day of January, 1914.

This certificate shall remain in force for TWENTY YEARS, unless sooner terminated by law. [92]

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the city of Washington,

this thirteenth day of January, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal]

J. T. NEWTON,
Acting Commissioner of Patents.

6-530.

UNITED STATES PATENT OFFICE.

William L. Bitting, of Sherman, Texas, Assignor to Koke Company of America, a corporation of Arizona.

Trademark for a nonalcoholic fruit-flavored beverage of certain named ingredients.

94,869.

Registered Jan. 13, 1914.

Application filed August 21, 1911, Serial No. 58,310.

STATEMENT.

To All Whom it may Concern:

Be it known that I, William L. Bitting, a citizen of the United States of America, residing at Sherman, county of Grayson, State of Texas, and doing business at East Side Square, in said city, have adopted and used the trademark shown in the accompanying drawing, for a nonalcoholic beverage, consisting of a rock-candy syrup, caramel-colored, and having a [93] fruit flavoring, in Class No. 45, beverages, nonalcoholic.

The trademark has been continuously used in my business since November 10, 1898.

The trademark is applied or affixed to the goods, or to the bottles or packages containing the same, by

placing thereon a printed label on which the trademark is shown.

WILLIAM L. BITTING.

KOKE

DECLARATION.

State of Texas,
County of Grayson,—ss.

William L. Bitting, being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes himself to be the owner of the trademark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trademark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trademark is used by him in commerce among the several States of the United States; that the drawing and description presented truly represent the trademark sought to be registered; and that the specimens show the trademark as actually used upon the goods.

WILLIAM L. BITTING.

Subscribed and sworn to before me this the 29th day of July, 1911.

[L. S.]

T. L. BROME,
Notary Public. [94]

**Plaintiff's Exhibit "D"—Certificate of Registration
of Trademark.**

No. 55,878.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come:

This is to certify that by the records of the United State Patent Office it appears that Murfreesboro Bottling Works of Murfreesboro, Tennessee, a corporation organized under the laws of the State of Tennessee, did, on the 10th day of April, 1905, duly file in said Office an application for REGISTRATION of a certain

TRADEMARK

for Beverages Made from Coca Leaves, that it duly filed therewith a drawing of the said Trademark, a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and has duly complied with the requirements of the law in such case made and provided, and with the regulations prescribe by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicant is entitled to registration of its said TRADEMARK under the law, the said TRADEMARK has been duly registered to Murfreesboro Bottling Works and its successors or assigns, in the UNITED STATES PATENT OFFICE, this 21st day of August, 1906.

This certificate shall remain in force for Twenty Years, unless sooner terminated by law.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the city of Washington, this twenty-first [95] day of August in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

[United States Patent Office Seal.]

E. B. MOORE,
Acting Commissioner of Patents.

TRADEMARK.

No. 55,878. Registered Aug. 21, 1905.
Murfreesboro Bottling Works.
Beverages Made from Coca Leaves.
Application filed Apr. 10, 1905.

KOKE.
Proprietor,
MURFREESBORO BOTTLING WORKS,
By MUNN & CO.,
Attorneys.

Witnesses:

JOS. A. RYAN,
AMOS W. HART.

UNITED STATES PATENT OFFICE.

Murfreesboro Bottling Works, of Murfreesboro, Tennessee. Trademark for beverages made from Coca-leaves.

No. 55,878. Registered Aug. 21, 1906.
Statement and Declaration.
Application filed April 10, 1905, Serial No. 1,044.

STATEMENT.

To All Whom It may Concern: [96]

Be it known that the Murfreesboro Bottling Works, a corporation duly organized under the laws of the State of Tennessee, and located in the city of Murfreesboro, county of Rutherford, in said State, and doing business at No. 630 Water Street, in said city of Murfreesboro, had adopted for its use the trademark shown in the accompanying drawing.

The trademark has been continuously used in the business of said corporation, since May 1, 1902.

The class of merchandise to which the trademark is appropriated is Class 45, Beverages, nonalcoholic, and the particular description of goods comprised in said class upon which said trademark is used is beverages made from coca-leaves.

The trademark is usually displayed on the package containing the goods by placing thereon a printed label on which the same is shown.

MURFREESBORO BOTTLING WORKS,

By J. W. HUGGINS,

Secty.

DECLARATION.

State of Tennessee,
County of Rutherford.

J. W. Huggins, being duly sworn, deposes and says that he is the secretary of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement true; that he believes said corporation is the owner of the trademark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-

mark, either in the [97] identical form or in any such near resemblance thereto as might be calculated to deceive; that said trademark is used by said corporation in commerce among the several States of the United States, and particularly between the States of Tennessee, Alabama and Georgia, and between the United States and foreign nations or Indian tribes and particularly with Europe and Germany; and that the description, drawing, and specimens presented truly represent the trademark sought to be registered.

J. W. HUGGINS.

Subscribed and sworn to before me, a notary public, this eighth day of April, 1905.

[L. S.]

J. H. CRICHLow,

Notary Public. [98]

**Plaintiff's Exhibit "E"—Assignment of Trademark,
etc.**

2—392.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

Received and Recorded on the 12th day of December, 1911, in Liber M. 88, page 406 of Transfers of Patents.

IN TESTIMONY WHEREOF, I have caused the seal of the Patent office to be hereunto affixed.

[Seal of U. S. Pat. Office.]

6-1697.

E. B. MOORE,

Commissioner of Patents.

ASSIGNMENT OF TRADEMARK, etc.,

Whereas Murfreesboro Bottling Works, of Murfreesboro, Tennessee, a corporation, was the owner

of a Trademark known as "Koke" as applied to and used on tonic beverages and registered the same in the United States Patent Office on or about August 21, 1906, said registration being numbered 55,878; and

Whereas Murfreesboro Bottling Works, a corporation, was owned and operated by S. B. Christy, C. B. Huggins, and Christy & Huggins Co., composed of S. B. Christy, C. B. Huggins, and J. W. Huggins, all of Murfreesboro, Tennessee, who, subsequent to the registration of said Trademark "Koke" in the United States Patent Office, converted said corporation into [99] a firm composed of S. B. Christy, C. B. Huggins, and J. H. Huggins, and Christy & Huggins Co., composed of the said S. B. Christy, C. B. Huggins, and J. W. Huggins, who thereupon continued the business of said Murfreesboro Bottling Works, a corporation, under the firm name and style of Murfreesboro Bottling Works; and

Whereas Koke Company of America, a corporation duly organized and existing under and by virtue of the laws of Arizona, is desirous of acquiring all of the right, title, and interest of said S. B. Christy, C. B. Huggins, and J. W. Huggins, and of the firm of Christy & Huggins Co., aforesaid, trading under the name and style of Murfreesboro Bottling Works, in and to the said Trademark "Koke," as applied to and used on beverages, the United States Trademark registration No. 55,878 therefor, and in and to the goodwill of the business of manufacturing beverages; and

Whereas said S. B. Christy, C. B. Huggins, and J. W. Huggins, and the said firm of Christy & Huggins Co., aforesaid, are willing that said Koke Company of America shall acquire, own, and enjoy all of said interests as aforementioned:

NOW, THEREFORE, BE IT KNOWN that for and in consideration of the sum of Five Hundred Dollars, lawful money, the receipt whereof is hereby acknowledged, and for other valuable consideration, the said S. B. Christy, C. B. Huggins and J. W. Huggins, and the firm of Christy & Huggins Co., have sold, set over and assigned, and by these presents do sell, set over and assign to and unto the said Koke Company of [100] America, its successors and assigns, all and several their right, title and interest in and to the said Trademark "Koke," as applied to and used on beverages, and in and to the United States Trademark registration No. 55,878, registered August 21, 1906, and in and to the goodwill of the business of manufacturing and selling beverages.

Signed at Murfreesboro, Tennessee, this 28th day of November, 1911.

S. B. CHRISTY,
C. B. HUGGINS,
J. W. HUGGINS,
CHRISTY & HUGGINS CO.,

By J. W. HUGGINS,
Trading Under the Firm Name and Style of Murfreesboro Bottling Works.

State of Tennessee,
County of Rutherford,—ss.

On this 28th day of November, 1911, before me, James D. Richardson, a Notary Public in and for the County of Rutherford, State of Tennessee, came the above-named S. B. Christy, C. B. Huggins, and J. W. Huggins, with whom I am personally acquainted, and personally known to me to be the persons they represent themselves to be, and each of whom, being by me duly sworn, deposes and says that the statements set forth in the foregoing instrument are true, and that each of them signed, personally, the foregoing instrument, and that the signature of Christy & Huggins Co., was affixed with their [101] approval and consent, by J. W. Huggins, for the purposes therein set forth.

[Notarial Seal] JAS. D. RICHARDSON, Jr.,
Notary Public.

My com. exp. in Jany. 1, 1915: [102]

**Plaintiff's Exhibit "F"—Mexican Certificate of
Registration of Trademark.**

REPUBLICA MEXICANA.

CERTIFICADO DE REGISTRO DE MARCA.
11,688.

La Oficina De Patentes Y Marcas.

A todos los que el presente Certificado vieren, sabed:

Que The Koke Company Sociedad Anonima, ha—
registrado legalmente en esta Oficina el dia one de
Octubre de mil novecientos once a las once horas

dier mintuos a. m. la marca cuyo facsimile y descripcion van adjuntos.

Este registro es valido por veinte anos a partir de la fecha citada arriba.

Y para que conste se le— extiende el presente Certificado en la ciudad de Mexico, a 14 de Octubre de 1911.

El Director,

(Signed) J. DE LAS FUNELLE.

[Seal: Cfream de Patentesy Marcas. Mexico.]

(Second page contains copy of Trademark:)

Trade

KOKE

Mark

M. M. Rgtrda

THE KOKE COMPANY,

Phoenix, Arizona,

U. S. A. [103]

A TODOS LOS QUE PUEDA INTERESAR:

Sabed que The Koke Company, una Sociedad Anonima, debidamente organizada bajo las leyes del Estado de Arizona, Estados Unidos de America, y teniendo su Oficina Principal de negocios en la Ciudad de Phoenix, Estado de Arizona, Estados Unidos de America, y habiendo elegido lugar para recibir notificaciones en la Ciudad de Mexico, D. F. Calle de Gante num. 1, despacho del Senor E. Deal Fuller, ha adoptado para su uso propio y exclusivo una marca industrial denominada "Koke," y que sirve para distinguir debidas gaseosas.

La marca que se desca registrar consiste en las letras que vienen a constituir la palabra "Koke,"

formulada en cualquier estilo y tamaño. En el liston que se encuentra arriba de dicha palabra y formado por la ultima letra de la misma se ve la palabra "Trade," y en el liston debajo de la referida palabra "Koke" y formada por la primera letra de la misma se ve la palabra "Mark." Debajo de esta palabra se ve la leyenda "Marca Industrial Registrada," u aun mas abajo el nombre y la ubicacion del propietario de la marca, prescriptas por la ley.

Despues de haber asi descrito la marca, me reservo lo siguiente.

RESERVAS.

Esta marca industrial puede ser de cualquier tamaño, color o postura, en que se coloque la palabra "Koke," pudiendo esta estar representada por cualquier estilo o forma de letra, sin que por ello se altere el caracter de la citada marca industrial cuyo detalle esencial es la palabra "Koke." [104]

En testimonio de lo cual he firmado la anterior descripcion y reserva, como spoderado de The Koke Company en Ciudad de Mexico, D. F. Hoy 11 de Octubre e 1911.

(Signed) E. DEAN FULLER,
Apoderado. [105]

**Plaintiff's Exhibit "G"—Canadian Certificate of
Registration of Trademark.**

(First page contains copy of Trademark.)

Trade
KOKE
Mark.

(Canadian seal impressed across face of trademark.)

DOMINION OF CANADA.

We, The Koke Company of America, having our

head office at Phoenix, in the State of Arizona, one of the United States of America, hereby request you to register in the name of The Koke Company of America a Specific Trademark to be used in connection with the sale of a Soda-fountain Beverage which we verily believe is ours on account of having been the first to make use of the same.

We hereby declare that the said Specific Trademark was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof. The said Specific Trademark consists of the word KOKE in scroll form having the word "Trade" printed in small clear type above the word "KOKE" in the scroll or extension of the letter E in the word "KOKE" and the word "Mark" printed in similar type in the extension of the first letter K in the word "KOKE."

A drawing of the said Specific Trademark is hereto annexed.

Signed at Dallas, Texas, U. S. A., this 4th day of March, 1913, in the presence of the two undersigned witnesses. [106]

KOKE COMPANY OF AMERICA,

J. C. MAYFIELD,

President.

Witness:

W. McCARTY MOORE.

F. H. STEPHENSON.

To the Minister of Agriculture,
Ottawa.

(Canadian Seal Dept. of Agriculture appears on
face of the preceding.)

Dieu et Mon Hoit.

(Canadian Seal Dept. of Agriculture.)

THIS IS TO CERTIFY that this TRADE-
MARK (Specific) to be applied to the sale of a Soda-
Fountain Beverage, and which consists of the word,
"KOKE" in scroll form, having the word "Trade"
printed in small clear type above the word "Koke,"
in the scroll or extension of the letter "E" in the
word "Koke" and the word "Mark" printed in simi-
lar type in the extension of the first letter "K" in
the word "Koke," as per the annexed pattern and
application, has been registered in THE TRADE-
MARK REGISTER NO. 74, Folio 18223 in accord-
ance with "THE TRADEMARK and DESIGN
ACT," by

The Koke Company of America
of the City of Phoenix, State of Arizona,
United States of America.

on the 12th day of April, A. D. 1913.

Department of Agriculture.

(Copyright and Trademark Branch.)

Ottawa, Canada, this 12th day of April, A. D. 1913.

GEO. F. HALLOWAY,

Deputy of the Minister of Agric. [107]



Exhibit "H"



Exhibit "I"

[Endorsements]: E.—21 (Phx.) Original. In the District Court of the United States for the District of Arizona. The Coca-Cola Company vs. The Koke Company of America et al. Received copy of the Within Answer. J. E. Morrison. By Chas. L. Marshall. Answer. This 28th day of May, 1914. Filed May 28, 1914. Geo. W. Lewis, Clerk. By R. E. L. Webb, Dep. Sloan & Westervelt, Fleming Building, Phoenix, Arizona, Solicitors for Defendants. [109]

*In the District Court of the United States for the
District of Arizona.*

No. E.—21—IN EQUITY.

THE COCA-COLA COMPANY

vs.

KOKE COMPANY OF AMERICA, SOUTHERN
KOKE COMPANY, LTD., KOKE COM-
PANY OF TEXAS, KOKE COMPANY OF
ARKANSAS, KOKE COMPANY OF
OKLAHOMA.

Order Extending Time for Taking Evidence.

In this cause, by agreement of counsel for the complaint and the defendants, it is ordered by the Court:

1. That the time for taking testimony be extended so as to allow the complainant sixty days from the first day of July, 1914, in which to take its evidence in chief, and so as to allow the defendants sixty days from the expiration of the time thus allowed the complainant in which to take its evidence,

and so as to allow the complainant thirty days from the expiration of the defendants' time, as aforesaid, in which to take its rebuttal evidence.

2. That the evidence of any of the witnesses for any of the parties may be taken by depositions, at any place desired by the party calling the witness, within the time aforesaid, before any disinterested notary public, upon giving the opposing counsel five days' notice in writing of the time when, and the place where, said depositions are to be taken, and the names of the witnesses whose depositions are to be taken.

3. That the evidence, when taken by depositions, shall be taken down in shorthand and written out on a typewriter by any competent, disinterested stenographer, and the witnesses shall sign and swear to their depositions, and the notary public shall affix [110] his seal to his jurat in each instance.

4. That such depositions as may be taken in the case of the Coca-Cola Company vs. Southern Koke Company, Limited, et al., pending in the United States District Court for the Eastern District of Louisiana, New Orleans Division, at New Orleans, Louisiana, or copies thereof when properly signed and sworn to by the witnesses taken within the time aforesaid, may be filed in this court and in this cause, and used as evidence on the trial thereof, in so far as the same may be relevant, by any of the parties thereto, subject, however, to exceptions for competency, relevancy and materiality.

5. That all exhibits, upon being properly identified, may be retained by counsel producing and offer-

ing the same, subject to reasonable inspection by opposing counsel.

6. That the right is reserved to all parties to produce witnesses in person in open court and give oral evidence on the trial of this cause, and that a duly certified transcript of any oral evidence that may be given on the trial of the case of *The Coca-Cola Company vs. Southern Koke Company, Limited*, in the United States District Court at New Orleans, as aforesaid, may be filed in this cause, and used as evidence on the trial thereof, by any of the parties thereto, in so far as the same may be relevant, subject, however, to exceptions for competency, relevancy and materiality.

7. That the right to object, at the trial, to the competency, relevancy and materiality of any evidence offered on the trial of this cause is expressly reserved to all parties.

J. E. MORRISON,
Solicitor for Complainant.

Agreed to:

FRANK F. REED and
E. S. ROGERS,

Attorney for Complainant.

CHANDLER, THOMSON HIRSCH,
General Counsel for Complainant.

SLOAN & WESTERFELT,
Attorney for Defendants.

LITTLETON, LITTLETON & LITTLETON,
General Counsel for Defendants. [111]

[Endorsements]: No. E.-21 (Phx.) U. S. District Court for the District of Arizona. The Coca-

Cola Co., Complainant, vs. Koke Co. of America et al., Defendants. Order Extending Time for Taking Evidence. Filed July 1, 1914. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Law Offices Littleton, Littleton & Littleton, Chattanooga, Tenn. [112]

*In the United States District Court, District of
Arizona.*

No. E.-21 (Phx.).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA, SOUTHERN
KOKE COMPANY, LTD., THE KOKE
COMPANY OF OKLAHOMA, and THE
KOKE COMPANY OF ARKANSAS,
Defendants.

Order Extending Time for Taking Evidence.

This matter coming on to be heard upon motion of Messrs. Richard E. Sloan and James Westervelt, solicitors for defendant, and it appearing to the Court that the plaintiff has heretofore filed written interrogatories to be answered by the various defendants as therein set forth and that the defendants have filed within the time allowed by Equity Rule No. 58, objections to said interrogatories and to each of them;

NOW, THEREFORE, on motion of Richard E. Sloan, Esq., and of James Westervelt, Esq., solicitors for the defendants, it is ordered that the time of

defendants to answer the said interrogatories be enlarged and extended until the expiration of fifteen days after the determination and order of this Court upon said objections to said interrogatories.

Dated July 16th, 1914.

WM. H. SAWTELLE,

Judge.

U. S. District Court, District of Arizona. Coca-Cola Company vs. Koke Co. of America et al. Order. Service acknowledged July 9, 1914. J. T. Morrison, Atty. for Plaintiff. Filed Jul. 16, 1914. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. Sloan & Westervelt, Fleming Building, Phoenix, Arizona. [113]

In the United States District Court for the District of Arizona.

No. E-21 (Phx.).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY of AMERICA et al.,

Defendants.

Notice of Motion for Leave to Amend.

To the Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants Herein or Richard E. Sloan, Esq., or James Westervelt Esq. Their Solicitors of Record.

You will please take notice that on the 1st day of September, 1914, at the hour of ten o'clock A. M. or

as soon thereafter as counsel can be heard, the above-named plaintiff at the courtroom of the above-entitled court, in the city of Phoenix, District of Arizona, will move the Court to amend its original bill of complaint in accordance with the attached motion and copy of proposed amendments.

Dated Phoenix, Arizona, August 17th, 1914.

J. F. MORRISON,
Solicitor for Plaintiff. [114]

*In the United States District Court for the District
of Arizona.*

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

Motion for Leave to Amend.

Comes now the above-named plaintiff, and moves the Court that it be granted leave to amend its original bill of complaint in the particulars and manner specified in the attached copy of the proposed amendments.

J. E. MORRISON,
Solicitor for Plaintiff. [115]

*In the United States District Court for the District
of Arizona.*

THE COCA-COLA COMPANY,

Plaintiff,

versus

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Defendants.

Amendments to Bill of Complaint.

And now comes the plaintiff herein, The Coca-Cola Company, and by leave of the Court heretofore had and obtained, amends its Bill of Complaint herein in the following particulars, viz.:

(1.)

Cancel paragraph (c) on page 2, and substitute therefor the following:

“(c). This suit is also brought upon the ground of the joint and several infringement by the defendants in commerce conducted among the several States, of the United States, and foreign nations of the trademark ‘Coca-Cola’ of the plaintiff duly registered under the Act of Congress of March 3, 1881, in the United States Patent Office on January 3, 1893, by the plaintiff, and duly registered by the plaintiff in the Patent Office of the United States under and by virtue of the provisions of the Act of Congress of February 20, 1915, entitled, ‘An Act to Authorize the

Registration of Trademarks used in Commerce with foreign nations, among the several States of the United States, and with the Indian Tribes, and to Protect the Same.' Said registration relates to articles of merchandise of the same descriptive properties as the article and merchandise upon which and in connection with which the infringing marks and names used by the defendants are employed."

(2.)

On page 3, cancel the following: [116]

"Said J. S. Pemberton thereupon, after the use of said name 'Coca-Cola' upon said syrup, sold and shipped in commerce between the several States and with foreign nations, did, after application, statement and verification, in due form, register and was granted a certificate of registration of said trademark name 'Coca-Cola' on June 6th, 1887, as a trademark for said syrup under and by virtue of the provisions of the Act of Congress of March 3d, 1881."

(3.)

Insert at the close of paragraph 2 the following:

"That in addition to the trademark name Coca-Cola which is very generally used by purchasers who desire plaintiff's beverage, there are also used and employed certain nicknames by which plaintiff's product is known, asked for and identified by purchasers and consumers thereof. That one of the said nicknames is the word 'Koke' into which plaintiff's trademark name Coca-Cola has been abbreviated by the public, and another of said nicknames is the word 'Dope,' and said words 'Koke' and 'Dope,' and each of them, are now and for many years past have been, and prior to the application

of either of them to any other beverage, recognized and commonly and familiarly used nicknames for Coca-Cola, and the words 'Koke' and 'Dope' and each of them have been for many years commonly and familiarly used nicknames for plaintiff's said beverage, so that a request at a soda-fountain, or wherever beverages are on sale, for 'Koke' or 'Dope' is understood to be a specific and definite request for Coca-Cola, so intended by the purchaser using such word, and so understood by the dealer, and for very many years, and continuously to the present time, and before the application of said words 'Koke' or 'Dope,' or either of them, to any other beverage whatsoever, the said words 'Koke' and 'Dope' indicated, designated and identified, and now indicate, designate and identify exclusively plaintiff's said product, and mean it and nothing else." [117]

(4.)

Insert at the beginning of Paragraph 3 the following:

"(3.) Plaintiff further states that after it had become so vested with and entitled to the sole and exclusive right to the use of the said trademark Coca-Cola, and was the owner thereof as, its trademark, plaintiff did, on the 14th day of May, 1892, duly apply to the United States Patent Office for registration of the said trademark Coca-Cola, and thereupon did make the statement and declaration required by law for such registration, and did show that said trademark had been used by the plaintiff and its privies in title for a tonic syrup or beverage in com-

merce between the States of the United States, and with foreign nations, and complied in all respects with the Act of Congress of March 3d, 1881, entitled, 'An Act to Authorize the Registration of Trademarks and Protect the Same,' and complied with all the regulations of the Commissioner of Patents in that behalf, and thereupon, on the 31st day of January, 1893, the registration of the said trademark Coca-Cola was duly allowed for nutrient or tonic beverages, and certificate of registration thereof was granted to plaintiff dated January 31st, 1893, which said registration and certificate thereof are still in full force and effect, and wholly unrevoked and uncanceled. A copy of the said certificate of registration is attached hereto, marked Exhibit 'A'-1."

(5.)

Insert in paragraph 5, between the words "Coca-Cola" and "the original," "the said nicknames therefor, 'Koke' and 'Dope.' "

(6.)

Cancel in paragraph 6 beginning with the following:

"Said extract is designated by said Koke Company of America," etc., down to and including the words, "styled 'Koke' and 'Koke Syrup,'" in said paragraph 6, and in lieu thereof, substitute the following: [118]

"Said extract is designated by said defendant sometimes as 'Koke' and sometimes as 'Dope,' and is sold and distributed under said names by it, which said name 'Koke' is a common and familiar abbreviation of plaintiff's trademark name Coca-Cola, and it

and the said name 'Dope' each are a commonly and familiarly known and recognized nickname for plaintiff's said product, and mean it and nothing else. That the defendant, Koke Company of America, sells and ships from the City of St. Louis, said imitative extract usually under the said name 'Koke,' and in said imitated barrels, to the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas, each of which is a corporation of the State of Arizona, Southern Koke Company, Limited, operating and doing business in the City of New Orleans, and the Koke Company of Texas operating and doing business in the City of Dallas, Texas. The said extract is by said last-named corporations, used as a basis for making a syrup for sale to soda-fountains and bottlers, from which syrup an aerated beverage can be made, and is made, which said syrup resembles Coca-Cola syrup made by plaintiff, in color, taste and appearance, and which said syrup so made from said extract by the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company or Arkansas, is called and styled, 'Koke' and 'Koke Syrup,' 'Dope' and 'Dope Syrup.' "

(7.)

Cancel paragraph 7 to the words "Exhibit 'B' hereto attached," and substitute therefor the following:

"That the adoption and use by the said defendant, Koke Company of America of the words 'Koke' and 'Dope' began many years after the plaintiff's said

product under the name 'Coca-Cola, and under the abbreviations and nicknames 'Koke' and 'Dope' had become widely and favorably known, and the said words 'Koke' and 'Dope' were adopted by the said Koke Company of America, and used by it and the defendants herein, for the [119] purpose only of enabling them and dealers who purchased from them, to pass off the said imitative product of the defendants and the beverage made therefrom, as and for Coca-Cola, and for the purpose of taking an unfair and unlawful advantage of the reputation of, and demand for, plaintiff's said product; that defendants deliberately and intentionally, and without any need or necessity, make said syrup by them designated 'Koke' and 'Dope,' like the Coca-Cola syrup of plaintiff, in color, taste and appearance, in order to enable the use and substitution thereof as genuine Coca-Cola syrup, and the beverage made therefrom to be passed off as the genuine Coca-Cola beverage; that the form in which the said word 'Koke' is printed by defendants and applied to the product sold by them, is in deliberate and designed imitation of the characteristic and distinctive form of plaintiff's manner of printing its trademark name Coca-Cola; that the spurious product of the Koke Company of America under the said names 'Koke' and 'Dope' as sold and distributed by defendants herein, has in the past, and is now being substituted, dispensed and palmed off upon the public by the defendants herein, and their vendees, as and for plaintiff's said product; that the use by defendants of the name 'Koke' and 'Dope' has in fact, caused deception of the public, and is now de-

ceiving the public into the belief that the said spurious product is the product of the plaintiff, and that the said passing off and deception are effectuated by the use by said defendants of the words 'Koke' and 'Dope' as applied to the product of the said Koke Company of America, which said names, and each of them, are commonly and familiarly known and recognized nicknames for plaintiff's said product, which fact plaintiff is informed and believes, and states the fact to be, is well known to defendants and each of them, and said words were adopted and used by the said defendants for the purpose of substituting, passing off and deception, and for no other purpose; and to enable dealers and dispensers to substitute and pass off the said spurious product of the [120] Coke Company of America when the plaintiff's product is asked for, either by the name 'Coca-Cola, or by its recognized, familiarly known and commonly used nicknames, and the said deception and passing off are aided by the fact that said syrup under the names 'Koke' and 'Dope' is placed by said defendants in barrels colored red, in imitation of plaintiff's distinctive barrels, and so furnished both to soda-fountain stands, dispensers, and to bottlers, for manufacture into an aerated beverage, which said aerated beverage when sold, is sold under the name 'Koke' or 'Dope,' and that defendants have applied to aerated products put up under their alleged authority and made from said syrup produced by the Koke Company of America, labels in imitation of plaintiff's distinctive labels, upon the aerated Coca-Cola made by both plaintiff and authorized bottlers from genuine

Coca-Cola syrup, and that the said syrup product of said Koke Company of America so used is unnecessarily and fraudulently colored in imitation of the distinctive color of plaintiff's product. Said defendants also furnish to soda-fountain dispensers, dispensing bottles or decanters in deliberate imitation of plaintiff's distinctive dispensing bottles or decanters."

(8.)

Cancel paragraph 8, and substitute the following:

"(8.) Defendants state to both the bottlers and dispensers of the syrup sold by the said defendants under the names 'Koke' and 'Dope' that said syrup is made under the same syrup formula as Coco-Cola syrup, and by one who is acquainted therewith, and was at one time interested in said formula, all of which statements are false, and known to defendants to be false and said defendants advise and instruct said bottlers of said product designated by them 'Koke' and 'Dope' and retail purchasers of the same, and retail dealers buying and selling the [121] same, and also, dispensers thereof, to sell, substitute and palm off on buyers for use and consumption asking for and intending to purchase the genuine Coca-Cola, either under the trademark name Coca-Cola, or some recognized, commonly used and familiarly known nickname thereof the said beverages made from the syrup of the defendant, and designated by them 'Koke' and 'Dope,' and said retailers and dispensers follow said instructions and do deceive buyers, and users, and substitute and palm off defendant's said product as and for the genuine product of the plaintiff. That it

is the intention and design of the said defendants manufacturing and distributing said imitative and spurious product under the names 'Koke' and 'Dope,' and each of them, by and through the use and employment of said words 'Koke' and 'Dope,' the said spurious and imitative syrup, and the aforesaid simulated receptacles, labels, styles, signs and devices adopted and employed in connection therewith, to enable retail dealers and dispensers who are supplied therewith, to substitute and pass off the spurious beverage made from said spurious syrup, in response to requests for, and as the genuine Coca-Cola beverage, and that such substitution and passing off have been and are successfully and constantly accomplished by such retail dealers and dispensers, and purchasers and consumers are thereby deceived and defrauded. That it is also the intention and design of said defendants manufacturing and dispensing said imitative and spurious syrup, and of said defendant engaged in aerating and bottling the spurious beverage made therefrom, that through and by the use of the said words 'Koke' and 'Dope,' and the said imitative and spurious syrup, and the aforesaid simulated receptacles, bottles, caps, styles, labels and signs, and devices, adopted and employed as aforesaid, to enable retail dealers supplied with said aerated beverage put up in said bottles bearing said names 'Koke' and 'Dope,' and dressed up in the fraudulent and deceptive style aforesaid, thereby to substitute and pass off, in response to inquiries for [122] plaintiff's product, and as and for the plaintiff's product, said

spurious aerated bottled beverage, and that through and by the means aforesaid, said substitution and passing off have been and are systematically and constantly accomplished, by such retail dealers and purchasers, and consumers are thereby deceived and defrauded.”

(9.)

Add as a new paragraph the following:

“(9.) The Koke Company of America claims to have secured, or now to own certain alleged registration in the United States Patent Office, of the words ‘Koke’ and ‘Dope,’ which said registrations were secured in fraud of plaintiff’s rights, and said Koke Company of America, and its emmissaries, including the defendants herein, threaten dealers in Coca-Cola, who dispense and sell Coca-Cola in response to the universally known and commonly used nicknames therefor, ‘Koke’ and ‘Dope,’ with prosecution and suit, claiming the words ‘Koke’ and ‘Dope’ to be the registered trademarks of The Koke Company of America, and that the sale of any beverage other than the product of the Koke Company of America, on calls for ‘Koke’ and ‘Dope’ is an infringement of the alleged rights of The Koke Company of America, and of said alleged registrations, and that the same is a violation of the Federal laws, and threatening prosecution therefor. That the said threats are for the sole purpose of harassing persons selling plaintiff’s product, and damaging and embarrassing plaintiff in its business, and that defendants well know and have long known that neither they nor the Koke Company of America, have any rights in the names ‘Koke’ or ‘Dope,’ but that the same are well recognized nick-

names of plaintiff's product, universally so understood by the public and recognized by dealers."

(10.)

Amend paragraph 3 of the prayer by canceling to the words "or like the word 'Coca-Cola' of the plaintiff, or the word 'Koke,'" and substituting as follows: [123]

"That said defendants, and each of them, their officers, servants, agents, employees, attorneys, licensees and assigns, and all acting by or under their authority, may be at first during the pendency of this suit, and afterwards perpetually, enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, on any product not being the genuine product of the plaintiff, the word 'Coca-Cola,' or any like word, or the word 'Koke,' or any like word, or the word 'Dope,' or any like word, or any name, or nickname, by which plaintiff's product is commonly known; from claiming or asserting any right in the name 'Koke' or in the name 'Dope,' or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product, Coca-Cola."

[Seal]

THE COCA-COLA COMPANY,

By CHAS. H. CANDLER,

Vice-President,

Plaintiff.

FRANK F. REED,

EDWARD S. ROGERS,

CANDLER, THOMSON & HIRSCH,

Attorneys for Plaintiff. [124]

State of Georgia,
County of Fulton,—ss.

Charles H. Candler, being duly sworn, deposes and says that he is Vice-President of The Coca-Cola Company, plaintiff herein; that he has read the above and foregoing Amendments to the Bill of Complaint herein, and knows the contents thereof, and that the same are true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes them to be true.

CHAS. H. CANDLER.

Sworn to and subscribed before me, this 4th day of August, 1914.

[Seal]

W. A. LANDERS,
N. P. Fulton Co., Ga. [125]

**Plaintiff's Exhibit "A"—No. 1—Certificate of
Registration of Trademark.**

2-394.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

To All Persons to whom These Presents Shall Come,
GREETING:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this office of the Certificate of Registration, Statement, Declaration and Drawing in the matter of the

Trademark
Registered by

The Coca-Cola Company,

January 31, 1893,

Number 22,406,

for

Nutrient or Tonic Beverages.

The certificate of registration was granted for the term of thirty years, and so far as is disclosed by the records of this office, said certificate is still in full force and effect.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 3d day of September, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States of America, the one hundred and thirty-seven.

[Seal]

F. A. TENNANT,

Acting Commissioner of Patents.

(Exhibit "A"—#1.) [126]

NO. 22,406.

THE UNITED STATES OF AMERICA.

To All Whom It may Concern:

This is to certify that by the records of the United States Patent Office it appears that The Coca-Cola Company, of Atlanta, Georgia, a corporation organized under the laws of the State of Georgia, did, on the 14th day of May, 1892, deposit in said Office for Registration, facsimiles of a certain

TRADEMARK

for Nutrient or Tonic Beverages.

and the date of the receipt thereof was duly noted and

recorded; that on the 14th day of May, 1892, it deposited therewith a statement, and a written declaration under oath of Asa G. Candler, an officer of said corporation, copies of all of which are hereto annexed; and the said corporation having made the payment of a fee of Twenty-five Dollars, and complied with the regulations in such cases prescribed by the COMMISSIONER OF PATENTS, and in all other respects complied with an Act of Congress approved March 3, 1881, entitled "An Act to authorize the Registration of Trademarks and protect the same," the said facsimiles, statement, and declaration were duly recorded, and the said TRADEMARK has been duly registered in the said PATENT OFFICE this 21 day of January, one thousand eight hundred and ninety-three and protection therefor will remain in force for THIRTY YEARS from said date unless sooner terminated in accordance with Section 5 of said Act.

IN TESTIMONY WHEREOF the seal of the DEPARTMENT OF THE INTERIOR is hereto affixed this thirty-first day of January, eighteen hundred and ninety-three, and of the Independence of the United States, the one hundred and seventeenth.

Given under my hand at Washington, D. C.

[Seal]

W. E. SIMONDS,

Commissioner of Patents. [127]

UNITED STATES PATENT OFFICE.

THE COCA COLA COMPANY, OF ATLANTA, GEORGIA.

TRADE-MARK FOR NUTRIENT OR TONIC BEVERAGES.

STATEMENT and DECLARATION of Trade-Mark No. 22,406, registered January 31, 1906
Application filed May 14, 1892.

STATEMENT.

To all whom it may concern:

Be it known that THE COCA COLA COMPANY, a corporation organized under the laws of the State of Georgia, and located in the city of Atlanta, Fulton county, in the State of Georgia, and doing business in said city of Atlanta, has adopted for its use a Trade-Mark for a Tonic, Sirup, or Beverage, of which the following is a full, clear, and exact specification.

The said trade-mark of said company consists of the word or words "Coca-Cola." These words have been generally written as a compound word and in the particular form represented in the accompanying fac-simile, that is to say, with the lower portion of the "C" beginning the word "Coca" extended under the entire word, in the form of a dash, and the top of the "C" beginning the word "Cola" extended over the letters following in the form of a dash. Upon the dash of the first "C" said corporation generally has the word "Trade-Mark." While said corporation prefers to form the initial "C's" as just described, and also to form the word as a compound word, yet the word may be altogether as one word,

or separately as two words, and the dash omitted, without materially altering the character of the said trade-mark, the essential feature of which is the word "COCA-COLA."

This trade-mark was adopted by the private in title of THE COCA COLA COMPANY, about the 28th day of June, 1887, and has been continuously used by them and the said corporation since that time.

The class of merchandise to which this trade-mark is appropriated is beverages, and the particular goods comprised in such class or which it is used by the said company is nutrient or tonic beverages. It is usually affixed to the goods by either affixing it to the bottles, kegs or barrels containing the same, in the form of a label, or by printing or stamping the same thereon, or by blowing the letters in the bottle itself.

THE COCA COLA COMPANY,
By ASA G. CANDLER,
President.

Witnesses:

JOHN S. CANDLER,
WM. A. HAYGOOD.

DECLARATION.

State of Georgia, county of Fulton, ss:

ASA G. CANDLER being duly sworn, deposes and says that he is president of the corporation, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade-mark

is used by the said corporation in commerce between the United States and foreign nations and Indian tribes and particularly with Canada, and that the description and fac-similes presented for record truly represent the trade-mark sought to be registered.

ASA G. CANDLER,

Sworn and subscribed to before me, a notary public, this 6th day of May, A. D. 1892.
[L. S.] WM. A. HAYGOOD,
Notary Public, Fulton County, Georgia.

TRADE-MARK.

THE COCA COLA COMPANY.
NUTRIENT OR TONIC BEVERAGES.

No. 22,406.

Registered Jan. 31, 1893.

Coca-Cola
TRADE-MARK

Witnesses

*Geo. E. Fuchs**Robt. A. Fitzgerald*

Proprietor.

The Coca Cola Co

per

Lehmann Patisson & Nesbitt

Attorneys

[Endorsed]: #E—21. In the United States District Court for the District of Arizona. The Coca-Cola Company, Plaintiff, versus The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. (Amendments to Bill.) Service acknowledged this Aug. 17, 1914. Sloan and Westervelt, Solicitors for Defts. Filed Aug. 17, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.
[130]

*In the United States District Court for the District
of Arizona.*

THE COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA et al.,

Defendants.

**Minute Entry Appearing Under Date of Monday,
October 5, 1914.**

IT IS ORDERED that this case be set for hearing on motion to amend the objections to interrogatories on October 26, 1914, at 10 o'clock A. M.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA et al.,

Defendants.

IT IS ORDERED that this case be set for trial on October 26, 1914, at ten o'clock A. M. [131]

*In the District Court of the United States for the
District of Arizona.*

No. —. EQUITY.

THE COCA-COLA COMPANY.

vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE CO., LTD., THE
KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF OKLAHOMA, THE
KOKE COMPANY OF ARKANSAS.

Affidavit of A. B. Littleton.

United States of America,
District of Arizona,
State of Arizona,
County of Maricopa,—ss.

The affidavit of A. B. Littleton, who, having first been duly sworn, deposes and says:

That he is an attorney at law and resides in Chattanooga, Tennessee; that he is one of the attorneys for the defendants in this cause, and a member of the firm of Littleton, Littleton & Littleton, who are general counsel for the various defendants in the above-styled cause; that he has personally taken charge of, and in connection with the various counsel in the respective cities where suits are pending, conducted the defense of these defendants in all the suits now pending in the various courts of the United States between the Coca-Cola Company, the

plaintiff in the above-styled cause, and the several Koke Companies made [132] defendants in said proceedings; that he is thoroughly familiar with, and knows of his own personal knowledge, all the various steps taken in the various cases to date.

The history of all the cases is as follows:

On or about the 8th day of April 1914, the plaintiff filed a suit in the United States District Court at New Orleans against the Southern Koke Company, Limited, and various other defendants. On or about the 9th day of April, 1914, the same plaintiff filed a similar suit in the United States District Court at Dallas against the Koke Company of Texas and various other defendants. At about the same time it filed a similar suit in the United States District Court at St. Louis against the Koke Company of America, J. H. Van Deusen and J. C. Mayfield, Jr. All these suits were based upon the same ground of complaint, the bill filed in each case being substantially a duplicate of those in each of the other cases. Some time prior thereto the plaintiff had filed a notice of opposition in the United States Patent Office at Washington, opposing the registration of the trademark "Koke" by the Koke Company of America on the ground that the mark "Koke" was an infringement of the plaintiff's alleged trademark "Coca-Cola." Before the defendants answered any of these proceedings, plaintiff filed the above-styled suit in the United States District Court, at Phoenix, Arizona, against all five of the Koke Companies, on or about the 25 day of April, *May*, 1914, the bill being substantially a copy of

those filed in the other cases above referred to.

The answer was filed in the case at Dallas about May 9th, 1914, and the answers in the other cases were filed shortly thereafter. The answer in the above-styled cause was filed on the 28th day of May, 1914. Nothing further was done until [133] the time for plaintiff to take its evidence in chief, under the equity rules, had about expired. Mr. Harold Hirsch, of the firm of Candler, Thomson & Hirsch, of Atlanta, Georgia, General Counsel for plaintiff, asked affiant to enter into an agreement extending plaintiff's time for taking its evidence in chief, and providing that the evidence of any of the witnesses might be taken by depositions, and that copies of the depositions taken in one of the cases might be used in all of them. The agreement was signed by affiant's firm, and by Candler, Thomson & Hirsch, and by the respective attorneys of record in the several forums, was approved by the respective Judges, filed and made an order of court in the respective courts. Thereupon, after having given five days' notice, as provided in said order, plaintiff began taking its evidence in chief in Atlanta on July 27th, 1914. Forty-six witnesses were examined in Atlanta, most of whom were examined right from the start upon the question as to whether or not the words "Koke" and "Dope" are nicknames for plaintiff's product. Affiant, who was present at the taking of all the evidence in all the cities where it was taken, duly and properly objected to all such evidence as to said alleged nicknames, because it was irrelevant, immaterial and wholly outside the pleadings. Plaintiff

still continued to take evidence of this character until about noon, or the afternoon of July 29th, when plaintiff's attorneys served affiant with a copy of an amendment to their pleadings in the United States Patent Office, which they said they proposed to file. A copy of said amendment is hereto attached, and made a part of this affidavit, marked Exhibit "A." Plaintiff's attorneys at or about the same time advised affiant that they would also apply for leave to make a similar amendment to the bills in all the other cases, [134] including this one, and that they intended to include in said amendments a charge also covering the word "Dope." A copy of the precise amendments they proposed to make, however, was not served upon the defendants or their attorneys, or upon affiant, until plaintiff had taken practically all its evidence in chief.

Plaintiff then proceeded to take practically all its evidence in chief, except the evidence of certain experts as to the ingredients of plaintiff's product, etc. Plaintiff examined a vast array of witnesses from various parts of the country in Atlanta, Mobile, New Orleans, Dallas and Chicago, as to what they meant and understood, and as to what they thought the public meant and understood, by the words "Dope" and "Koke" when used in asking for soft drinks at soda-fountains, the purpose of the questions being to prove that "Dope" and "Koke" are nicknames for plaintiff's product. All this evidence was taken over the objection of defendants and against their consent. Still plaintiff did not apply for leave to amend its bill in this cause, or in any of the other

causes, and did not present defendants with a copy of the proposed amendments, until practically all its evidence on the questions raised by these amendments had been taken, and until after defendants time for taking evidence had begun to run.

When plaintiff began to introduce said evidence as to said alleged nicknames, affiant and defendants' other attorneys were surprised, as they had prepared the defense along other and different lines to meet the case made by the original bill, and were not prepared to cross-examine the witnesses on this feature. When the case, as to this feature, was sufficiently unfolded to enable affiant and defendants' other attorneys to see the plaintiff's new line of attack, they had neither the time nor the opportunity to prepare for a proper cross-examination of these witnesses, because there was no let-up in the taking of the [135] evidence until it was practically all taken, and affiant and defendants' attorneys were constantly on the road, traveling from city to city taking the evidence, and this occupied their entire time. Neither affiant nor defendants' other attorneys assisting in the cross-examination, had any opportunity to investigate either the law or the facts with reference to these alleged nicknames, or any opportunity to gather material for cross-examination, or to shape their line of defense or their line of cross-examination to meet the new turn of events. During the first several days of the taking of this evidence, affiant merely objected to the evidence as to the alleged nicknames and did not attempt to cross-examine the witnesses on that feature, so that

a number of the plaintiff's nickname witnesses got by without any cross-examination at all on that subject. Later, when plaintiff's attorneys served affiant with a copy of the amendment they proposed to file in the Patent Office, affiant did attempt a very meagre and cautious cross-examination of some of the witnesses on the question as to nicknames, but as he had had no notice prior to leaving home and going on the road that plaintiff would attempt to make out a case upon the nickname theory, and as he had had no opportunity to investigate either the law or the facts as to said alleged nicknames, his cross-examinations were necessarily so meagre and cautious and circumscribed, as to amount, in a great many instances to practically no cross-examination at all.

Affiant therefore states that, in his opinion, the defense in this case will be seriously prejudiced, and an injustice will be done to defendants, if the proposed amendments are permitted to be filed, because, if permitted, they will render all said evidence as to said alleged nicknames competent, and the result will be a practical denial to defendants of the right to cross-examine plaintiff's witnesses on this feature.

[136]

The plaintiff's evidence already taken in this case amounts to about three thousand pages of transcript, by far the larger part of which consists of evidence as to said alleged nicknames. In the taking of this evidence the defendants' attorneys went to Atlanta, Mobile, New Orleans, Dallas and Chicago, and while nearly a thousand witnesses were summoned, as shown by the notice to take depositions in this cause,

one hundred and nineteen witnesses were actually put upon the stand from various parts of the country. Copies of this evidence will be filed in the cases at New Orleans, Dallas, Phoenix, St. Louis, and Washington, thus, making in all fifteen thousand pages of transcript. When the records are printed for the various courts of appeals, there will be fifteen thousand pages to be printed, and, at the rate of \$1.00 a page this will run the costs up to the prodigious sum of \$15,000. And this is merely part of plaintiff's evidence in chief. If the defendants are compelled to repeat the process and to examine the whole body of the people, as the plaintiff did, to discover what they mean and understand by these alleged nicknames, the record will become so voluminous and the costs will become so great that if the defendants were cast in this court they would rather not appeal the case than to pay the cost of printing such a transcript. The defendants had no reason to anticipate the taking of any such vast amount of evidence under the allegations of the original bill, and no such volume of evidence would have been necessary, in affiant's opinion, under the allegations thereof.

The evidence taken in this case shows that all the facts with reference to these alleged nicknames were well known to the plaintiff before, and at the time when, it drafted and filed its original bill in this cause. It shows that plaintiff had some ten or twelve detectives, or "investigators," in the field for [137] a year or more before the filing of the bill in this cause gathering this evidence, and that these

detectives or "investigators" had made daily reports in writing, setting out even the minute details of the evidence. These reports were used in a good many instances by the witnesses, during the taking of the evidence, to refresh their recollections (some of the witnesses actually reading their evidence into the record from these reports), and plaintiff's attorneys used said reports as a guide in examining the witnesses. It seems, therefore, that what the witnesses would testify to as to these alleged nicknames was well known to the plaintiff, and that the evidence which the plaintiff has taken as to these alleged nicknames is exactly what the plaintiff knew it would be at the time it drafted and filed its original bill in this cause.

The evidence already taken, except as to the alleged nicknames, is squarely within the issues presented by the original bill and tends directly to sustain the allegations thereof, and, if it is worthy of belief and is not rebutted, is amply sufficient to warrant the court in granting the relief prayed for in the original bill. The evidence as to the alleged nicknames was entirely outside the issues as they existed when plaintiff's evidence was taken, and as they now exist, and was entirely irrelevant. It was objected to on this ground but that did not phase the plaintiff. Affiant verily believes therefore, that the plaintiff was not surprised by this evidence, and it did not turn out contrary to the plaintiff's expectations; but, on the other hand was exactly what plaintiff knew it would be when it drafted and filed its original bill in this cause.

In view of the facts hereinbefore set forth showing

that the plaintiff at the time of the filing of its original bill of complaint well knew what its evidence as to said alleged nicknames would be, and notwithstanding the allegations of said [138] original bill prepared its case, summoned its witnesses, and took all of its evidence upon that theory before serving defendants with a copy of its proposed amendments; affiant verily believes and states the facts to be that to permit said amendments would be to give to plaintiff an unfair and unconscionable advantage and would seriously prejudice defendants' case in that the plaintiff having misled defendants as to the issues to be tried, counsel for the latter was unprepared to cross-examine plaintiff's said witnesses and had no opportunity during the taking of said testimony of preparing for such cross-examination and therefore such cross-examination as counsel was able to make of plaintiff's said witnesses was necessarily of such haphazard and superficial character as to amount to practically none at all.

Affiant respectfully submits therefore that in all fairness the plaintiff ought not to be allowed to change the issues raised by its pleadings at this stage of the case, and that in the exercise of a sound judicial discretion leave to amend the bill of complaint should not be granted to plaintiff.

A. B. LITTLETON.

Subscribed and sworn to before me this 13th day of January, 1915.

[Seal]

GEO. W. LEWIS,
Clerk.

By R. E. L. Webb,
Deputy. [139]

**Plaintiff's Exhibit "A" Attached to Affidavit of A.
B. Littleton—Amendments to Pleading in
United States Patent Office.**

In the United States Patent Office.

THE COCA-COLA COMPANY

vs.

THE KOKE COMPANY OF AMERICA.

Opposition No. 1424.

Before the Examiner of Interferences.

AMENDMENTS.

The Coca-Cola Company, by leave duly had and obtained, amends its notice of opposition herein in the following particulars:

(1)

Page 2, line 6, by cancelling the words, "but that" after the name "Joseph Jacobs," and inserting the following: "and the said Walker, Candler & Co." and so that the said sentence as amended will read: "And the said Walker, Candler & Co., and the said Dozier and the said W. Walker in his individual capacity," etc.

(2)

By inserting at the close of paragraph 5, on page 4, the following: "That in addition to the trademark name Coca-Cola which is very generally used by purchasers who desire opposer's beverage, there are also used and employed by the public but never by opposer or any of its predecessors, certain nicknames by which opposer's products are known, asked for and [140] identified by purchasers and consumers

thereof, and that one of the said nicknames is the word "Koke" into which opposer's trademark Coca-Cola has been abbreviated by the public, and which said word "Koke" is now, and for many years has been, and prior to any use thereof by applicant, a recognized and commonly and familiarly used nickname for Coca-Cola, and the word "Koke" has been for many years commonly and familiarly known and accepted as a nickname for opposer's said beverage, so that a request at a soda-fountain, or wherever beverages are on sale, for "Koke" is understood to be a specific and definite request for Coca-Cola, so intended by the purchaser using such word, and so understood by the dealer, and for very many years, and continuously to the present time, the word "Koke" indicates, designates and identifies exclusively opposer's product, and means it and nothing else."

(3)

By inserting the after word "Coca-Cola" where it appears in line 11, page 5, the following: "and the abbreviation and nickname "Koke." By inserting in line 13, page 5, after the words, "Trade name," the words "abbreviation thereof and nickname."

(4)

By canceling in lines 24, 25 and 26, on page 5, after the word "Koke," the following: "which said name is a deceptive imitation in sound, appearance and suggestion of opposer's said trademark name Coca-Cola," and by inserting in lieu thereof the following: "which said name is a common and familiar abbreviation of opposer's trademark name Coca-Cola, and

a commonly and familiarly known and recognized nickname for opposer's said product, and means it and nothing else, which, opposer is [141] informed and believes and states the fact to be, is well known to applicant."

THE COCA-COLA COMPANY,
By CHARLES H. CANDLER,
Vice-President.

FRANK F. REED,
EDWARD S. ROGERS,
FRANCIS M. PHELPS,
HAROLD HIRSCH,

Attorneys for Opposer. [142]

[Endorsed]: In the District Court of the United States, District of Arizona. The Coca-Cola Company, Complnt., vs. The Koke Company of America et al., Defts. Affidavit. Filed Jan. 13, 1915. George W. Lewis, Clerk. [143]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Saturday,
January 23, 1915.**

Come now the defendants by Messrs. Sloan & Westervelt, Esquires, and the plaintiff by J. E. Morrison, Esquire, and the motion of the plaintiff for

leave to amend its bill of complaint on file herein and the objections of the defendants to certain interrogatories which are on file herein are argued by counsel and submitted to the Court for its decision and judgment thereon, and the same is taken under advisement by the Court. [144]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY

vs.

KOKE COMPANY OF AMERICA et al.

Affidavit of Edward S. Rogers.

State of Illinois,
County of Cook,—ss.

Edward S. Rogers, being duly sworn, deposes and states as follows:

I am one of counsel for the plaintiff in this proceeding.

The above-entitled proceeding is one of a number pending between the parties.

In the Patent Office of the United States under the title Coca-Cola Company v. Koke Company of America. This is a notice of opposition, for the purpose of opposing the attempted registration by the Koke Company of America, of the word Koke.

Coca-Cola Company vs. Southern Koke Company, Limited, James L. Wright and J. C. Mayfield and the Crescent City Seltz and Mineral Water Company, in the United States District Court for the Eastern District of Louisiana.

Coca-Cola Company vs. The Koke Company of Texas, [145] W. McCarty Moore, J. C. Van Winkle and E. M. Boyd, and George Bender, in the United States District Court, for the Northern District of Texas, Dallas Division.

Coca-Cola Company vs. Koke Company of America, J. C. Mayfield, Jr., and J. H. Van Deusen, in the United States District Court, for the Eastern Division of the Eastern District of Missouri, at St. Louis.

These cases are all upon a similar state of facts and are based upon the same acts of infringement, with the exception of the Patent Office case, which does not involve the use of the word "dope" by The Koke Company of America.

Since the same record is involved in all of these cases, it was stipulated and agreed by counsel that the testimony be taken together and the same transcript filed in all the cases.

I understand that Mr. A. B. Littleton has made an affidavit to the effect that the evidence in this cause was taken before the amendment or notice and that chance for proper cross-examination was not given.

The facts of the matter are that the taking of testimony on behalf of the plaintiff, in all of the pending cases, including this one, was begun at Atlanta, Georgia, on July 27, 1914, at the office of Candler, Thomson & Hirsch. On July 27th only one witness was examined—S. C. Dobbs, the plaintiff's vice-president, and his testimony was continued only until noon of that day, when an adjournment was taken until nine o'clock on July 28th. The adjournment was had at the request of counsel for the defendants,

one of whom had some engagement [146] and was unable to be present on that afternoon. Mr. A. B. Littleton, however, was present, and it was at his request that the adjournment was had. On the 28th, Mr. A. B. Littleton was joined by Mr. Jesse Littleton, and the testimony of W. L. Sams, George J. Martin, F. M. Robinson, Oscar C. Hightower, M. Tomlinson, Magnus L. Ramey, Winton H. Troutman, Asa G. Candler, John S. Candler, W. E. Venable, C. Howard Candler and D. E. Bolton was taken.

All of these witnesses were connected with the Coca-Cola Company and their testimony and cross-examination could in no way have been altered, changed or broadened by the averments of the amendment. Counsel was present, cross-examined the witnesses at great length and was in no way hampered.

At the adjournment of the taking of the testimony on the 28th, I personally advised Mr. A. B. Littleton that the plaintiff proposed to amend the pleadings in all the cases, to make a little more specific the general averments concerning infringement and unfair competition therein contained, and also to correct two mistakes. I stated to Mr. Littleton at that time specifically and definitely what amendments were proposed and what they would cover, and I immediately began the preparation of the amendments. The first one to be completed was the amendment in the Patent Office proceeding, which I drafted on July 29th and forwarded to Washington for filing on that day. I attach hereto a copy of a letter which I wrote to my Washington associate transmitting

the amendment. My recollection [147] is that I delivered to Mr. Littleton a copy of the amendment referred to in this letter on the date of the letter, July 29th. It may possibly not have been until the 30th but my recollection is that Mr. Littleton was given a copy on the 29th. The amendment as filed in the Patent Office is in all substantial respects the same (except that it contains no averment with respect to the defendants' use of the name "dope") as the amendments here proposed.

On July 29th and 30th I prepared the amendments in the other cases and copies were delivered to Mr. Littleton shortly thereafter.

To summarize, Mr. Littleton was fully advised on July 28th of our intention to amend and the nature of the amendments, and on July 29th or 30th he was given a copy of one of the amendments and shortly afterwards copies of all. He was fully advised of the nature and scope of the amendments and his cross-examination was in no wise restricted or hampered. He was given every opportunity to cross-examine all of the witnesses whose testimony was in any way affected by the amendments and availed himself of it fully. The taking of testimony in this case continued from July 27th up to August 18th. At every session counsel was present representing the defendants and cross-examination was very full and complete, and as far as I am able to discern could not have been fuller or more complete.

Amendments the same as those offered here have been offered in all of the other cases between the Coca-Cola Company and The Koke Company of

America and its subsidiaries and officers recited above. The amendments have been allowed to be filed in every such case [148] after hearing and over the objection of counsel for the Koke Company of America. In the Patent Office proceeding the amendment was first rejected by the Examiner of Interferences for jurisdictional reasons. On appeal, however, to the Commissioner of Patents, this action was reversed and the amendments were all allowed. A copy of the opinion of the Commissioner of Patents is attached hereto.

Amendments identical with those here proposed have been allowed in the United States District Court at St. Louis, in the United States District Court at Dallas and the United States District Court at New Orleans, all after hearing and objection and contest on behalf of the defendants.

EDWARD S. ROGERS.

Subscribed and sworn to before me this 15th day of January, 1915.

[Seal]

MARGARET SHEALY,

Notary Public. [149]

July 29th, 1914.

Mr. Francis M. Phelps,

c/o Messrs. Browne & Phelps,

Barrister Bldg., Washington, D. C.

Dear Frank,

I am enclosing you original and two copies of an amendment of Notice of Opposition in the matter of the Coca-Cola Co. v. Koke Company of America.

It has developed in the taking of the evidence that

the name "Koke" is the commonly and familiarly known nickname for Coca-Cola, and has been for many years, and the word as used by the Koke Co. of America is to take advantage of this trade situation; that the infringement is not so much the imitation of the name Coca-Cola by "Koke," as an infringement of trademark proper by the deceptive use of a nickname which is applied to our product. I think perhaps the testimony is clearly competent under the general averments of the Notice of Opposition, but it seems to Mr. Hirsch and myself that there should be a specific averment that "Koke" is an abbreviation or nickname for Coca-Cola. Therefore, I am sending you this amendment, which I would be glad if you would ask leave to file, and file. I think we are entitled to amend under the equity rules, and that the proposed amendment in no way changes the general cause of action so as to divest the Office of jurisdiction.

Please serve notice on Johnson, and bring the matter up as soon as you can, and get leave to file the amendment, and file it. I have notified Littleton, who is here taking evidence, that we propose to amend, and will deliver to him in the morning copy of the amendment.

Sincerely yours,

R—Enclosures. [150]

Hearing:

SET.

September 1, 1914.

In the United States Patent Office.

THE COCA-COLA COMPANY

v.

KOKE COMPANY OF AMERICA,

Opposition No. 1424.

APPEAL FROM EXAMINER OF
INTERFERENCES.

Trademark for Nonalcoholic Beverage, etc.

Application of Koke Company of America Filed
June 23, 1913, No. 71,308, Published December
9, 1913.

Mr. Harold Hirsch, Messrs. Frank F. Reed & Edward
S. Rogers, and Messrs. F. L. Browne & Francis
M. Phelps, for The Coca-Cola Company.

Mr. F. L. F. Johnson, for Koke Company of America.
Mr. Joseph W. Bailey, of Counsel.

This is an appeal by The Coca-cola Company from the decision of the examiner of interferences refusing to permit The Coca-Cola Company to amend its notice of opposition in the manner set forth in paragraphs 2, 3 and 4 of said proposed amendment filed August 3, 1914, the purport of which is that users of Coca-Cola frequently in ordering Coca-Cola ask for it as "Koke," to such an extent that "Koke" has become a familiar nickname for Coca-Cola, etc.

The decision of the examiner of interferences refusing the amendment seems to be based mainly on his opinion that this would set up a new ground of opposition, since it would enable The Coca-Cola

Company to prove prior use of the term "Koke."
[151]

I do not concur in this opinion of the examiner of interferences. The proposed amendment does not set up a foundation for The Coca-Cola Company to prove its own prior use of the word "Koke." Its testimony, which has been completed, does not tend to prove any such proposition. Indeed, at the hearing the opposer inserted in its proposed notice that neither The Coca-Cola Company nor its predecessors had ever used this word "Koke," so that there is no foundation for the supposed new ground for action set up by the examiner of interferences.

It appears that the purpose of both the original notice and the amended notice is broadly the same, and while the reasons are stated more fully in the amended notice, and in some respects differently from those in the original notice, they are in effect the same ground of complaint, and the amendment to the original notice seems to have been brought in good faith to make the notice of opposition correspond with the details of the testimony (*Brainard v. Buck*, 184 U. S. 99).

I can see no valid reason for refusing the Coca-Cola Company's request to amend and the decision of the examiner of interferences is reversed.

J. T. NEWTON,

First Assistant Commissioner.

September 5, 1914. [152]

[Endorsed]: E. —. U. S. Dist. Court, Arizona.
Coca-Cola Company vs. The Koke Company of
America et al. Affidavit of Edward S. Rogers on

Application to Amend the Bill of Complaint. Filed
Jan. 23, 1915. George W. Lewis, Clerk. [153]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY.

THE COCA-COLA COMPANY

vs.

THE KOKE COMPANY OF AMERICA et al.

Affidavit of Harold Hirsch.

State of Georgia,
County of Fulton.

Before me, an officer duly authorized to administer oaths, appears Harold Hirsch, who after being duly sworn deposes and says:

That this deponent is a member of the firm of Candler, Thomson & Hirsch, and that said firm has charge of the legal affairs of The Coca-Cola Company. That this deponent, together with Edward S. Rogers, of Chicago, Ill., is in charge of the litigation involved in the above-entitled cause.

This deponent further says that the testimony heretofore taken in the above-stated case commenced on the 27th day of July, 1914, at Atlanta, Ga., with Mr. A. B. Littleton as counsel for the defendant and this deponent and Edward S. Rogers, as counsel for plaintiff, present at the taking of the testimony. That due to the absence of the senior member of the firm of Littleton, Littleton & Littleton, and on the request of said senior member, the testimony of only

one witness was taken on said date, to wit, the 27th, that being the testimony of S. C. Dobbs.

Deponent further states that on the afternoon of the 28th or the morning of the 29th, of July, 1914, a copy of the proposed amendment in the above-stated cause was given to the said A. B. Littleton, attorney for the defendant, with [154] the statement that that amendment would be filed in the Patent Office case, and that similar amendments would be filed in each and every case wherein similar questions to the one involved in the above-stated cause are involved. That the said defendant, through its attorney, A. B. Littleton, was then and there put on notice that the said amendment similar to the one now offered in this case would be filed in each and every case. That at the time this notice was given to said defendant, the testimony of only two or three witnesses were taken. Deponent further shows that as soon and as rapidly as the amendments could be prepared which said amendments followed the one that had been presented to said A. B. Littleton, they were immediately forwarded to be filed in each and every case involving similar issues as the one involved in the above-stated case. Deponent further shows that an examination of the testimony taken and which is on file in the above-stated cause, will show that the question, as shown by the amendment, was involved at the time, and that while in some places only an objection was made to the testimony, in other places witnesses were carefully and in some places minutely examined in regard the terms "Dope" and "Koke."

Deponent further shows that the question involved in the amendment now offered in this cause has been involved in similar amendments offered in the United States Patent Office, in the District Court of the United States for the Northern District of Texas, in the District Court for the Eastern District of Missouri, and in the District Court for the Eastern District of Louisiana. That in the case of the amendment offered in the Patent Office, in Texas and in Missouri, arguments have been heard in opposition to the allowance of the amendment, and that in each instance, the amendment now [155] offered in the above case has been allowed.

Deponent further shows that this affidavit is made for use by the plaintiff in the application for leave to file an amendment.

And further this deponent saith not.

HAROLD HIRSCH.

Sworn to and subscribed before me, this 13 day of January, 1915.

[Seal]

LILIAN STANSBURY,
Notary Public, Fulton County, Georgia.

[Endorsements]: E ——. U. S. District Court, Arizona. Coca-Cola Company vs. The Koke Company of America et al. Affidavit of Harold Hirsch on Application to Amend Bill of Complaint. Filed Jan. 23, 1915. George W. Lewis, Clerk. Candler, Thomson & Hirsch, Attorneys and Counsellors at Law, 902-907 Candler Building, Atlanta, Ga. [156]

*In the United States District Court for the District
of Arizona.*

No. E.—21 (Phx.).

THE COCA-COLA COMPANY,

Complainant,

vs.

KOKE COMPANY OF AMERICA, SOUTHERN
KOKE COMPANY, THE KOKE COM-
PANY OF TEXAS, THE KOKE COM-
PANY OF OKLAHOMA, and THE KOKE
COMPANY OF ARKANSAS,

Defendants.

**Order Granting Motion to File Amendments to Bill
of Complaint.**

The Court, having considered the application and motion to amend plaintiff's bill, together with the objections thereto,—

IT IS HEREBY ORDERED that the said application be, and the same is, hereby granted, and that complainant be permitted to file said amendment herein said leave being granted on such terms as may be fixed by this Court in the final decree herein.

Dated at Tucson, Arizona, this 17th day of February, 1915.

WM. H. SAWTELLE,

Judge of the United States District Court for the
District of Arizona. [157]

[Endorsements]: In the United States District Court for the District of Arizona. The Coca-Cola

Company, Complainant, vs. Koke Company of America, Southern Koke Company, The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Order. Filed Feb. 17, 1915. George W. Lewis, Clerk. [158]

*In the United States District Court for the District
of Arizona.*

No. E.—21 (PHX.).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA, SOUTHERN
KOKE COMPANY, THE KOKE COM-
PANY OF TEXAS, THE KOKE COM-
PANY OF OKLAHOMA, and THE KOKE
COMPANY OF ARKANSAS,

Defendants.

**Order Sustaining Defendants' Objections to
Interrogatories 1-12.**

In the above-entitled cause,

IT IS ORDERED by the Court that defendants' objections, as amended, filed to the plaintiff's interrogatories 1 to 12, inclusive, filed herein by the plaintiff July 1, 1914, are hereby overruled, and the defendants, and each of them, will answer said interrogatories separately and fully, as required by law and the rules of this Court.

Dated at Tucson, Arizona, this 17th day of February, 1915.

WM. H. SAWTELLE,

Judge of the United States District Court for the District of Arizona. [159]

[Endorsements]: In the United States District Court for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. Koke Company of America, Southern Koke Company, The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Order. Filed Feb. 17, 1915. George W. Lewis, Clerk. [160]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS, Defendants.

Amended Bill of Complaint.

And now comes the plaintiff herein, The Coca-Cola Company, and by leave of the Court heretofore had and obtained, files its Amended Bill of Complaint herein as follows:

The Coca-Cola Company, a corporation duly organized and existing under and by virtue of the laws of the State of Georgia and a citizen of the State of Georgia, with its residence and principal place of business in the City of Atlanta in said State, brings this, its Amended Bill of Complaint, against Koke Company of Americam, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas. Each of said defendants is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona and each has its office and principal place of business in the City of Phoenix, Arizona, and each is a citizen of the State of Arizona and is a resident and inhabitant of the District of Arizona. The jurisdiction of this Court in [161] this suit depends upon the following grounds, to wit:

(a) This suit is brought for injunction, preliminary and perpetual, an accounting of profits and assessment of damages against the defendants upon the ground of their joint and several infringement of the trademark of the plaintiff, "Coca-Cola" and for unfair competition on the part of the defendants.

(b) In this suit there is a controversy between citizens of different states, wherein the sum or value in controversy, to wit, the value of the trademark name "Coca-Cola" and trade insignia of plaintiff for which protection is sought and the damages and injury thereto by the acts of defendants and the profits accruing to defendants by their infringing and fraudulent acts, exceeds exclusive of interest and costs, the

sum or value of Three Thousand Dollars.

(c) This suit is also brought upon the ground of the joint and several infringement by the defendants in commerce conducted among the several States of the United States, and foreign nations of the trademark "Coca-Cola" of the plaintiff duly registered under the Act of Congress of March 3, 1881, in the United States Patent Office on January 3, 1893, by the plaintiff, and duly registered by the plaintiff in the Patent Office of the United States under and by virtue of the provisions of the Act of Congress of February 20, 1905, entitled, "An Act to Authorize the Registration of Trademarks used in commerce with foreign [162] nations, among the several States of the United States, and with the Indian Tribes, and to Protect the same." Said registration relates to articles of merchandise of the same descriptive properties as the article and merchandise upon which and in connection with which the infringing marks and names used by the defendants are employed.

For its cause of action plaintiff states:

(1) That prior to the year 1886, J. S. Pemberton, of Atlanta, Georgia, began to make, according to a secret formula, which is now the sole property of plaintiff, a syrup for the manufacture of a refreshing nonalcoholic beverage, and that prior to the year 1886 he adopted as the trademark therefor the name "Coca-Cola," which was at the date of the adoption thereof, as aforesaid, in all respects new, original and distinctive and had never before been used. The said J. S. Pemberton continued alone to sell his

product under the name "Coca-Cola" until about the 8th day of July, 1887, when he sold a two-thirds interest in said business to one, Lowndes, and one, Venable, and that the said Pemberton, Venable and Lowndes became and continued to be the sole and exclusive owners and proprietors of the said secret formula, business and goodwill and the trademarks connected therewith, and together continuously carried on said business until about December 14, 1887, when the said Venable and Lowndes duly sold, assigned and transferred to one Dozier and one Walker their whole interest in the said business and the goodwill thereof and in [163] all secrets, formulas, trademarks, trade names and labels used in connection with the said business, and that said Dozier, Walker and Pemberton continued to be the sole and exclusive owners and proprietors thereof and together continuously carried on said business until about the 14th day of April, 1888, when said Pemberton duly sold, assigned and transferred all of his interest in the said secrets, formulas, business and the goodwill thereof and all trademarks and trade names used in connection therewith to Walker, Candler & Co., a copartnership composed of W. Walker, A. G. Candler and Joseph Jacobs, and that the said Walker, Candler & Co. and Dozier and said W. Walker, in his individual capacity, became and continued to be the sole and exclusive proprietors of said business and in the goodwill thereof and in all secrets, formulas, trademarks, trade names and labels used in connection with said business and together continuously carried on said business until

about the 17th day of April, 1888, when said W. Walker and said Dozier duly sold, assigned and transferred to A. G. Candler one-half of their two-thirds interest in said business and in the goodwill thereof and in all secrets, formulas, trademarks, trade names and labels used in connection therewith, and that the said Walker and Dozier, A. G. Candler and Candler & Co. became and continued to be the sole and exclusive owners and proprietors of the said business and the goodwill thereof and of all formulas, trademarks, trade names and labels, and together continuously [164] carried on said business until about the 30th day of August, 1888, when the said W. Walker and the said Dozier sold, assigned and transferred to A. G. Candler all of their remaining interest in the said business and in the goodwill thereof and all formulas, trademarks, trade names and labels used in connection with the said business, and that the said Walker, Candler & Co., and A. G. Candler became and continued to be the sole and exclusive owners and proprietors of the said business and the goodwill thereof and of all secrets, formulas, trademarks, trade names and labels used in connection therewith and together continuously carried on said business until on or about the 22d day of April, 1891, when the said Walker, Candler & Co. duly (sold, assigned and transferred to Asa G. Candler who is the same person as A. G. Candler above referred to), all of their right, title and interest in said business and in the goodwill thereof and any and all trademarks, trade names and labels used in connection therewith, and that the said Asa G.

Candler became and continued to be the sole and exclusive owner and proprietor of said business and the goodwill thereof and of all trademarks, trade names and labels connected therewith, and continuously carried on said business until about the 22d day of February, 1892, when the said Asa G. Candler duly sold, assigned and transferred to plaintiff all of his right, title and interest in and to said business and in the goodwill thereof [165] and in all secrets, formulas, trademarks, trade names and labels used in connection therewith, and that plaintiff has since continued to be the sole and exclusive owner and proprietor of said business and the goodwill thereof and of all secrets, formulas, trademarks, trade names and labels and has continuously owned and conducted the said business, goodwill, secrets, formulas, and owned and used said trademarks, trade names and labels down to the present time and is now conducting and using the same. Said formula and process for the manufacture of said beverage styled "Coca-Cola" was new and original and invented and discovered by said Pemberton and has at all times been kept and conserved by plaintiff, its predecessors and their employees as a trade and business formula, process and secret, and is now a secret formula and process and not known to the public or others than said plaintiff and its officers and employees and the predecessors of plaintiff.

(2) That continuously and without interruption plaintiff and its predecessors, during the period aforesaid from prior to 1886 to this date, have manufactured, marketed and sold syrups made under and

in accordance with said secret formula and process to be used in making a tonic beverage and that since the inauguration of said business, prior to the year 1886 by plaintiff's predecessors, as alleged in the preceding paragraph, said name "Coca-Cola" has been continuously used as a trademark name for the products so made and sold by plaintiff and its said predecessors, which said [166] trademark name was at the date of its adoption by plaintiff's predecessors aforesaid, in all respects new, characteristic and distinctive and had never before been used. Said trademark name "Coca-Cola" was at the outset and always has been and is now, new, characteristic and distinctive and was adopted and has been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar products of others, and the said trademark name does now identify and distinguish the said product.

That in addition to the trademark name Coca-Cola, which is very generally used by purchasers who desire plaintiff's beverage, there are also, used and employed certain nicknames by which plaintiff's product is known, asked for and identified by purchasers and consumers thereof. That one of the said nicknames is the word "Koke" into which plaintiff's trademark name Coca-Cola has been abbreviated by the public, and another of said nicknames is the word "Dope," and said words "Koke" and "Dope" and each of them, are now and for many years past have been, and prior to the application of either of them to any other beverage, recognized and commonly and familiarly used nicknames for

Coca-Cola, and the words "Koke" and "Dope" and each of them have been for many years commonly and familiarly used nicknames for plaintiff's said beverage, so that a request at a soda-fountain or wherever beverages are on sale, for "Koke" or "Dope" is understood to be a specific and definite request for Coca-Cola, so intended by the purchaser using such word, and so understood by the dealer, and for very many years, and continuously to the present time, and [167] before the application of said words "Koke" or "Dope," or either of them, to any other beverage whatsoever, the said words "Koke" and "Dope" indicated, designated and identified, and now indicate, designate and identify exclusively plaintiff's said product, and mean it and nothing else.

(3) Plaintiff further states that after it had become so vested with and entitled to the sole and exclusive right to the use of the said trademark Coca-Cola, and was the owner thereof, as its trademark, plaintiff did, on the 14th day of May, 1892, duly apply to the United States Patent Office for registration of the said trademark Coca-Cola and thereupon, did make the statement and declaration required by law for such registration, and did show that said trademark had been used by the plaintiff and its privies in title for a tonic syrup or beverage in commerce between the States of the United States, and with foreign nations, and complied in all respects with the Act of Congress of March 3d, 1881, entitled, "An Act to Authorize the Registration of Trade Marks and Protect the Same," and complied with all

the regulations of the Commissioner of Patents in that behalf, and thereupon, on the 31st day of January, 1893, the registration of the said trademark Coca-Cola was duly allowed for nutrient or tonic beverages, and certificate of registration thereof was granted to plaintiff, dated January 31st, 1893, which said registration and certificate thereof are still in full force and effect, and wholly unrevoked and uncanceled. A copy of the said Certificate of Registration is attached hereto marked Exhibit "A" #1. [168]

9.

Plaintiff further states that after it had become so vested with and entitled to the sole and exclusive right to use the said trademark "Coca-Cola" and was the owner thereof as a trademark for syrups for the manufacture of beverages, plaintiff did, on April 22, 1905, under and by virtue of the Act of Congress, approved February 20, 1905, duly apply to the United States Patent Office for the registration of the said trademark "Coca-Cola" and thereupon did make the statement and declaration required by law for such registration and did show that said trademark had been used by plaintiff and its predecessors as a trademark for tonic beverages and syrups for the manufacture of such beverages in commerce among the several States of the United States and with foreign nations and the Indian tribes and complied in all respects with the statute in that case made and provided and the regulations of the Commissioner of Patents, and thereupon, on the 31st day of October, 1905, registration of the said trademark "Coca-

Cola” was duly allowed for tonic beverages and syrups for the manufacture of such beverages, and a certificate of registration thereof was granted to plaintiff, dated October 31, 1905, and numbered 47,189, which said registration and the certificate thereof are still in full force and effect, wholly unrevoked and uncanceled. A copy of the certificate of such registration is hereto attached, marked Exhibit “A.”

And by virtue of the premises and by virtue of the said registrations aforesaid, plaintiff is entitled [169] to the sole and exclusive right, both generally and specially in commerce among the several states, in foreign commerce and in commerce with the Indian tribes, to use and employ the trademark name “Coca-Cola” or any like word as a trademark for and upon the said products and articles aforesaid, and upon merchandise of substantially the same descriptive properties and that such right of plaintiff has been generally acknowledged and acquiesced in by the trade and public.

(4) Plaintiff’s product is in the form of a syrup for the manufacture of a refreshing nonalcoholic beverage, and is made by plaintiff and in some instances furnished to bottlers, who under authority from plaintiff and under the supervision and control of plaintiff add aerated water thereto, making an aerated beverage, which is then bottled and sold to dealers and consumers under a distinctive and identifying label and bottle bearing plaintiff’s said trademark “Coca-Cola.” Said syrup also is sold and supplied by plaintiff to soda dispensers and is by

them, under the direction and instruction of plaintiff, mixed with water for consumption at soda-fountains. Plaintiff furnishes as a receptacle for its said syrup to soda dispensers a distinctive and characteristic display dispensing bottle or decanter. Plaintiff's said trademark name "Coca-Cola" is used by it upon labels attached to the receptacles containing said syrup and upon labels attached to the bottles containing the aerated beverage made from plaintiff's said syrup and put out by bottlers authorized by plaintiff and has always been printed and displayed in a characteristic and distinctive style of lettering. [170] Plaintiff's syrup has certain peculiarities of taste, color and appearance and is and long has been marketed by plaintiff in barrels or kegs, painted with a particular shade of red and readily distinguished by reason thereof, and marked with labels bearing conspicuously the trademark name "Coca-Cola," and that plaintiff's syrup has a characteristic and distinctive appearance due to the color thereof, which is arbitrary, unusual, unnecessary and was originally adopted and is now used as a means of distinguishing plaintiff's product from similar products of others, and that said color does in fact so identify and distinguish plaintiff's product in the mind of dealers, buyers, users and the public generally.

(5) Plaintiff's said product as dispensed to the public is a refreshing, nonalcoholic beverage, and is and has been very extensively advertised by plaintiff at an enormous expense and is well and favorably known throughout the United States, and the trade-

mark name "Coca-Cola" as the name thereof has long possessed and now has a great value and plaintiff's product sold thereunder is a meritorious and valuable article of merchandise, and that the said trademark name "Coca-Cola," the said nicknames therefor "Koke" and "Dope," the original and distinctive style of lettering used therefor, the said distinctive color, appearance and characteristics of the said syrup, the barrels or kegs in which the same is contained, distinctively colored red as aforesaid, the distinctive dispensing bottles or decanters and the distinctive and characteristic labels above referred to, and the distinctive bottles and labels containing the said [171] aerated beverage made from plaintiff's syrup and put up in such bottles with said labels by and under the authority of plaintiff, each by itself and all in combination, identify and distinguish plaintiff's said product and point exclusively to plaintiff as the origin thereof. Plaintiff has also and does use said trademark name "Coca-Cola" in the peculiar and distinctive style and colors on its stationery, letter-heads, bill-heads, and envelopes, circulars and price lists.

(6) That the defendant Koke Company of America, is a corporation of the State of Arizona, and was organized about September 15, 1911 and thereafter proceeded, at the city of St. Louis, Missouri, through its agents to manufacture an extract in unnecessary and deliberate imitation in color and appearance of plaintiff's Coca-Cola syrup, but different therefrom and greatly inferior thereto, and said extract is by said defendant, Koke Company of America, at St.

Louis, placed in barrels deliberately and purposely colored a peculiar shade of red in imitation of plaintiff's distinctively colored barrels. Said extract is designated by said defendant sometimes as "Koke" and sometimes as "Dope," and is sold and distributed under said names by it, which said name "Koke" is a common and familiar abbreviation of plaintiff's trademark name Coca-Cola, and it and the said name "Dope" each are commonly and familiarly known and recognized nickname for plaintiff's said product, and mean it and nothing else. That the defendant, Koke Company of America sells and ships from the City of St. Louis said imitative extract usually under the said name "Koke," and in said imitated barrels, to the defendants, [172] Southern Koke Company Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas, each of which is a corporation of the State of Arizona, Southern Koke Company, Limited, operating and doing business in the City of New Orleans, and the Koke Company of Texas operating and doing business in the City of Dallas, Texas. The said extract is by said last-named corporations, used as a basis for making a syrup for sale to soda-fountains and bottlers from which syrup and aerated beverage can be made and is made, which said syrup resembles Coca-Cola syrup made by plaintiff, in color, taste and appearance and which said syrup so made from said extract by the defendants, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, The Koke Company of Arkansas,

is called and styled "Koke" and "Koke Syrup," "Dope" and "Dope Syrup," and is put up in barrels, decanters and dispensing bottles, similar in shape, size and color to the barrels, decanters and dispensing bottles used by plaintiff for Coca-Cola syrup and marked with the word "Koke" in style similar to the style of Coca-Cola as used by plaintiff upon said receptacles and which said imitative syrup and the said beverage are by said defendants and dealers who purchase from them, sold, substituted and palmed off as and for Coca-Cola syrup and beverage, and that said defendants, as a matter of fact, do sell, substitute and palm off the said syrup and extract as Coca-Cola and as and for plaintiff's said Coca-Cola syrup, and that the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma, and the Koke Company of Arkansas, all actively connive at and participate in said fraud, substitution [173] and deception.

(7) That the adoption and use by the said defendant, Koke Company of America of the words "Koke" and "Dope" began many years after the plaintiff's said product under the name Coca-Cola, and under the abbreviations and nicknames "Koke" and "Dope" had become widely and favorably known, and the said words "Koke" and "Dope" were adopted by the said Koke Company of America, and used by it and the defendants herein, for the purpose only of enabling them and dealers who purchased from them, to pass off the said imitative product of the defendants and the beverage made

therefrom, as and for Coca-Cola, and for the purpose of taking an unfair and unlawful advantage of the reputation of, and demand for, plaintiff's said product; that defendants deliberately and intentionally, and without any need or necessity, make said syrup by them designated "Koke" and "Dope," like the Coca-Cola syrup of plaintiff, in color, taste and appearance, in order to enable the use and substitution thereof as genuine Coca-Cola syrup, and the beverage made therefrom to be passed off as the genuine Coca-Cola beverage; that the form in which the said word "Koke" is printed by defendants and applied to the product sold by them, is in deliberate and designed imitation of the characteristic and distinctive form of plaintiff's manner of printing its trademark name Coca-Cola; that the spurious product of The Koke Company of America under the said names "Koke" and "Dope" as sold and distributed by defendants herein, has in the past, and is now being substituted, dispensed and palmed off upon the public by the defendants [174] herein, and their vendees, as and for plaintiff's said product; that the use by defendants of the names "Koke" and "Dope" has in fact, caused deception of the public, and is not deceiving the public into the belief that the said spurious product is the product of the plaintiff, and that the said passing off and deception are effectuated by the use by said defendants of the words "Koke" and "Dope" as applied to the product of the said Koke Company of America, which said names, and each of them, are commonly and familiarly known and recognized nicknames for

plaintiff's said product, which fact plaintiff is informed and believes, and states the fact to be, is well known to defendants and each of them, and said words were adopted and used by the said defendants for the purpose of substituting, passing off and deception, and for no other purpose; and to enable dealers and dispensers to substitute and pass off the said spurious product of the Koke Company of America when the plaintiff's produce is asked for, either by the name Coca-Cola, or by its recognized, familiarly known and commonly used nicknames, and the said deception and passing off are aided by the fact that said syrup under the names "Koke" and "Dope" is placed by said defendants in barrels colored red, in imitation of plaintiff's distinctive barrels, and so furnished both to soda-fountain stands, dispensers, and to bottlers, for manufacture into an aerated beverage, which said aerated beverage when sold, is sold under the name of "Koke" or "Dope," and that [175] defendants have applied to aerated products put up under their alleged authority and made from said syrup produced by the Koke Company of America, labels in imitation of plaintiff's distinctive labels, upon the aerated Coca-Cola made by both plaintiff and authorized bottlers from genuine Coca-Cola Syrup, and that the said syrup product of said Koke Company of America so used is unnecessarily and fraudulently colored in imitation of the distinctive color of plaintiff's product. Said defendants also, furnish to soda-fountain dispensers, dispensing bottles or decanters in deliberate imitation of plaintiff's distinctive dis-

pending bottles or decanters.

Exhibit "B" hereto is a photograph which shows a bottle bearing plaintiff's label containing the aerated beverage produced under plaintiff's authority from genuine Coca-Cola syrup, side by side, with a bottle containing an aerated product made from the syrup "Koke" put up and labeled under alleged authority of defendant, Koke Company of America, by the defendant, Southern Koke Company, which is the Arizona corporation above named as the Southern Koke Company, Limited, defendant herein. Said bottled Koke bears a label in imitation of plaintiff's distinctive label and shows the deceptive word Koke printed thereon in said imitated type and form of lettering. Attached hereto as Exhibit "C" is a photograph of plaintiff's distinctive dispensing bottle or decanter and defendant's imitated dispensing bottle.

(8) Defendants state to both the bottlers and dispensers of the syrup sold by the said defendants under the [176] names "Koke" and "Dope" that said syrup is made under the same syrup formula as Coca-Cola syrup, and by one who is acquainted therewith, and was at one time interested in said formula, all of which statements are false, and known to defendants to be false, and said defendants advise and instruct said bottlers of said product designated by them "Koke" and "Dope" and retail purchasers of the same, and retail dealers buying and selling the same, and also, dispensers thereof, to sell, substitute and palm off on buyers for use and consumption asking for and intending to purchase the genuine Coca-

Cola, either under the trademark name Coca-Cola, or some recognized, commonly used and familiarly known nickname thereof, the said beverages made from the syrup of the defendant, and designated by them "Koke" and "Dope," and said retailers and dispensers follow said instructions and do deceive buyers, and users, and substitute and palm off defendant's said product as and for the genuine product of the plaintiff. That it is the intention and design of the said defendants manufacturing and distributing said imitative and spurious product under the names "Koke" and "Dope," and each of them, by and through the use and employment of said words "Koke" and "Dope," the said spurious and imitative syrup, and the aforesaid simulated receptacles, labels, styles, signs and devices adopted and employed in connection therewith, to enable retail dealers and dispensers who are supplied therewith, to substitute and pass off the spurious beverage made from said spurious syrup, in response to requests for, and as the genuine Coca-Cola beverage, and that such substitution and passing off have been and are successfully and constantly accomplished [177] by such retail dealers and dispensers, and purchasers and consumers are thereby deceived and defrauded. That it is also, the intention and design of said defendants manufacturing and dispensing said imitative and spurious syrup, and of said defendant engaged in aerating and bottling the spurious beverage made therefrom, that through and by the use of the said words "Koke" and "Dope," and the said imitative and spurious syrup, and the afore-

said simulated receptacles, bottles, caps, styles, labels and signs and devices, adopted and employed as aforesaid, to enable retail dealers supplied with said aerated beverage put up in said bottles bearing said names "Koke" and "Dope," and dressed up in the fraudulent and deceptive style aforesaid, thereby to substitute and pass off, in response to inquiries for plaintiff's product, and as and for the plaintiff's product, said spurious aerated bottled beverage, and that through and by the means aforesaid, said substitution and passing off have been and are systematically and constantly accomplished, by such retail dealers and purchasers, and consumers are thereby deceived and defrauded.

(9) The Koke Company of America claims to have secured, or now to own certain alleged registration in the United States Patent Office, of the words "Koke" and "Dope," which said registrations were secured in fraud of plaintiff's rights, and said Koke Company of America, and its emissaries, including the defendants herein, threaten dealers in Coca-Cola, who dispense and sell Coca-Cola in response to the universally known and commonly used nickname therefore, [178] "Koke" and "Dope," with prosecution and suit, claiming the words "Koke" and "Dope" to be the registered trademarks of The Koke Company of America, and that the sale of any beverage other than the product of the Koke Company of America, on calls for "Koke" and "Dope" is an infringement of the alleged rights of The Koke Company of America, and of said alleged registrations, and that the same is a violation of the Federal laws,

and threatening prosecution therefor. That the said threats are for the sole purpose of harassing persons selling plaintiff's product and damaging and embarrassing plaintiff in its business, and that defendants well know and have long known that neither they nor the Koke Company of America, have any rights in the names "Koke" and "Dope," but that the same are well recognized nicknames of plaintiff's product, universally so understood by the public and recognized by dealers.

Plaintiff, therefore, prays—

(1) That the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and the Koke Company of Arkansas, and each of them, be made parties defendant hereto, and that said defendants, and each of them, be required to answer each and every allegation herein, but not under oath, the answer of each of said defendants under oath being hereby waived.

(2) That a hearing may be had herein and the plaintiff's rights in the premises be established and adjudicated.

(3) That said defendants, and each of them, their officers, servants, agents, employees, attorneys, licensees and assigns, and all acting by or under their authority, may [179] be at first during the pendency of this suit, and afterwards perpetually, enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-

Cola," or any like word, or the word "Koke," or any like word, or the word "Dope" or any like word, or any name, or nickname, by which plaintiff's product is commonly known; from claiming or asserting any right in the name "Koke" or in the name "Dope," or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product, Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices now used by the defendants; from using in connection with the sale or shipment any product, not the plaintiff's, barrels or receptacles colored in imitation of the plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by defendants or any of them is made from the same formula as Coca-Cola syrup or that defendants or any of them may rightfully use or employ the Coca-Cola formula; from coloring or otherwise contriving any product not the plaintiff's in such a way as to be calculated to induce the belief that the same is the plaintiff's and further, from doing any act or thing, or using any name or names, devices, artifices, or contrivances, which may be calculated to represent that any product not of plaintiff's production is the [180] genuine "Coca-Cola" of plaintiff.

(4) That defendants and each of them may be required to account to plaintiff for any and all profits derived by them by reason of their unlawful conduct in the premises.

(5) That defendants may be required to pay to the plaintiff such damages as it may have sustained by reason of the defendants' *unlaw* conduct.

(6) That defendants may be required to pay the costs of this suit and that plaintiff may be decreed to such other and further relief as the court may seem just.

(7) That process of this court issue directed to the said defendants, Koke Company of America, Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas, and each of them, commanding them to be and appear before this Honorable Court at Phoenix, Arizona, on a day certain therein named, there to answer, make and abide the further order of the court.

[Corporate Seal] THE COCA-COLA CO.

By CHAS. H. CANDLER, V. Pt.,
Plaintiff.

J. E. MORRISON,
Solicitor for Plaintiff.

CANDLER, THOMSON & HIRSCH,
FRANK F. REED and
EDWARD S. ROGERS,

Of Counsel for Plaintiff. [181]

State of Georgia,
County of Fulton,—ss.

Charles H. Candler, being duly sworn, deposes and says that he is vice-president of The Coca-Cola Company, plaintiff herein; that plaintiff is a corporation and affiant makes this affidavit and verification for it and in its behalf and is duly authorized so to do; that

he has read the above and foregoing Amended Bill of Complaint and knows the contents thereof, and that the same is true.

CHAS. H. CANDLER.

Sworn to and subscribed before me this 31 day of Aug., 1914.

[Notarial Seal]

W. A. LANDERS,

Notary Public, Fulton County, Ga. [182]

UNITED STATES PATENT OFFICE.

THE COCA COLA COMPANY, OF ATLANTA, GEORGIA.

TRADE-MARK FOR NUTRIENT OR TONIC BEVERAGES.

STATEMENT and DECLARATION of Trade-Mark No. 22,406, registered January 31, 1892.
Application filed May 14, 1892.

STATEMENT.

To all whom it may concern:

Be it known that THE COCA COLA COMPANY, a corporation organized under the laws of the State of Georgia, and located in the city of Atlanta, Fulton county, in the State of Georgia, and doing business in said city of Atlanta, has adopted for its use a Trade-Mark for a Tonic, Sirup, or Beverage, of which the following is a full, clear, and exact specification.

The said trade-mark of said company consists of the word or words "Coca-Cola." These words have been generally written as a compound word and in the particular form represented in the accompanying fac-simile, that is to say, with the lower portion of the "C" beginning the word "Coca" extended under the entire word, in the form of a dash, and the top of the "C" beginning the word "Cola" extended over the letters following in the form of a dash. Upon the dash of the first "C" said corporation generally has the word "Trade-Mark." While said corporation prefers to form the initial "C's" as just described, and also to form the word as a compound word, yet the word may be altogether as one word,

or separately as two words, and the dashes omitted, without materially altering the character of the said trade-mark, the essential feature of which is the word "COCA-COLA."

This trade-mark was adopted by the privies in title of THE COCA COLA COMPANY, about the 28th day of June, 1887, and has been continuously used by them and the said corporation since that time.

The class of merchandise to which this trade-mark is appropriated is beverages, and the particular goods comprised in such class on which it is used by the said company is nutrient or tonic beverages. It is usually affixed to the goods by either affixing it to the bottles, kegs or barrels containing the same, in the form of a label, or by printing or stamping the same thereon, or by blowing the letters in the bottle itself.

THE COCA COLA COMPANY,
By ASA G. CANDLER,
President.

Witnesses:

JOHN S. CANDLER.
WM. A. HAYGOOD.

DECLARATION.

State of Georgia, county of Fulton, ss:

ASA G. CANDLER being duly sworn, deposes and says that he is president of the corporation, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade-mark

is used by the said corporation in commerce between the United States and foreign nations and Indian tribes and particularly with Canada, and that the description and fac-similes presented for record truly represent the trade-mark sought to be registered.

ASA G. CANDLER,

Sworn and subscribed to before me, a notary public, this 6th day of May, A. D. 1892.

[L. S.] WM. A. HAYGOOD,
Notary Public, Fulton County, Georgia.

TRADE-MARK.

THE COCA COLA COMPANY.
NUTRIENT OR TONIC BEVERAGES.

No. 22,406.

Registered Jan. 31, 1893.

Coca-Cola
TRADE MARK

Witnesses

Geo. E. Truch.

Prof. A. Fitzgerald

Proprietor.

The Coca Cola Co

per

Lehmann Pattison & Nesbit

Attorneys.

UNITED STATES PATENT OFFICE.

THE COCA COLA COMPANY, OF ATLANTA, GEORGIA.

**TRADE-MARK FOR TONIC BEVERAGES AND SYRUPS FOR THE MANUFACTURE
OF SUCH BEVERAGES.**

No. 47,189.

Statement and Declaration.

Registered Oct. 31, 1905

Application filed April 22, 1905. Serial No. 2,730

STATEMENT.

To all whom it may concern.

Be it known that THE COCA COLA COMPANY, a corporation duly organized under the laws of the State of Georgia, and located in the city of Atlanta, county of Fulton, in said State, and doing business at No. 179 Edgewood avenue, in said city of Atlanta, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark of this corporation consists of the words "COCA-COLA."

This trade-mark has been continuously used in the business of said corporation and those from whom it derived its title since about the 28th day of June, 1887.

The class of merchandise to which this trade-mark is appropriated is beverages, and the particular description of goods comprised in said class upon which this trade-mark is used is tonic beverages and syrups for the manufacture of such beverages.

The trade-mark is generally displayed on the packages containing the goods by placing thereon a printed label on which the same is shown and by printing or stamping the same thereon or by blowing the letters into the bottles or other containers of the goods.

THE COCA COLA COMPANY,
By ASA G. CANDLER,
Its President.

DECLARATION.

State of Georgia, county of Fulton, ss:

ASA G. CANDLER being duly sworn deposes and says that he is the president of the corporation the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said mark, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said mark is used by said corporation in commerce among the several States of the United States and all of said States, and between the United States and foreign nations and Indian tribes, and particularly between the United States and the Republics of Mexico

and Cuba, and with Canada and the five civilized tribes of Indians; that the description drawing and specimens presented truly represent the mark sought to be registered; and that the mark has been in actual use as a trade-mark of the applicant for more than ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ASA G. CANDLER.

Subscribed and sworn to before me, Z. D. HARRISON, Clerk of the supreme court of the State of Georgia, this the 17th day of April, 1905.

[L. S.]

Z. D. HARRISON.

Clerk of the Supreme Court of Georgia. [20]

TRADE-MARK.

No. 47,189.

REGISTERED OCT. 31, 1905.

THE COCA COLA COMPANY.

TONIC BEVERAGES AND SYRUPS FOR THE MANUFACTURE OF SUCH
BEVERAGES.

Application Filed Apr. 22, 1905.

Coca-Cola

PROPRIETOR
The Coca Cola Company
by Fred Beall
attorney





Exhibits C.

[Endorsements]: United States District Court for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Amended Bill of Complaint. Service acknowledged 1/5/15. Richard E. Sloan, James Westervelt, Solicitors for Defts. Filed Feb. 20, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [189]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

**Minute Entry Appearing Under Date of Saturday,
March 13, 1915.**

The objections to interrogatories to be propounded to the defendants herein are argued by J. E. Morrison, Esq., upon behalf of the plaintiff and Richard E. Sloan, Esq., upon behalf of the defendants.

Upon motion of the defendant IT IS ORDERED by the Court that the defendants be allowed thirty days within which to file their answer to the plaintiff's amended bill of complaint on file herein, in accordance with stipulation of counsel. [190]

*In the United States District Court for the District
of Arizona.*

No. E-21 (PHX.).

COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA, SOUTHERN
KOKE COMPANY, THE KOKE COMPANY
OF TEXAS, THE KOKE COMPANY OF
OLAHOMA, and THE KOKE COMPANY
OF ARKANSAS,

Defendants.

**Order Sustaining Defendant's Objections to
Interrogatories 1 to 12.**

In the above-entitled cause,

IT IS ORDERED by the Court that the order heretofore entered herein, dated the 17th day of February, 1915, overruling defendants' objections, as amended, filed to the plaintiff's interrogatories 1 to 12, inclusive, be vacated and that in lieu thereof the following order be entered herein:

IT IS ORDERED by the Court that defendants' objections, as amended, filed to plaintiff's interrogatories 1 to 12, inclusive, are hereby sustained.

Dated at Tucson, Arizona, this 23d day of March, 1915.

WM. H. SAWTELLE,

Judge of the United States District Court for the
District of Arizona. [191]

[Endorsed]: No. E-21 (Phoenix). In the United States District Court for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. Koke Company of America, Southern Koke Company, The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Order. Filed Mar. 23, 1915. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [192]

*In the District Court of the United States for the
District of Arizona.*

No. 21—IN EQUITY.

THE COCA-COLA COMPANY

vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF ARKANSAS, THE
KOKE COMPANY OF OKLAHOMA.

Answer to Amended Bill of Complaint.

THE ANSWER OF DEFENDANTS TO THE
AMENDED BILL OF COMPLAINT HERE-
TOFORE FILED IN THIS CAUSE.

Respondents, for answer to so much and such parts of the amended bill as they have not heretofore answered, and as they are advised it is necessary for them to answer, say:

I.

For answer to paragraph I of the amended bill, respondents say:

They have no knowledge as to whether or not plaintiff registered its alleged trademark, "Coca-Cola," in the United States Patent Office on January 3, 1893, as alleged, but, if plaintiff did so register it, respondents charge that said registration was void, and of no effect because the respondents are advised and believe, and accordingly state the fact to be, that up to that time neither the plaintiff nor any of its predecessors in title, or alleged predecessors in title, had ever used said words "Coca-Cola" as a trademark for plaintiff's product in commerce with any foreign nation, or with any of the Indian tribes, and the registration of said mark [193] was therefore procured by fraud.

For further answer to paragraph 1 of the amended bill, respondents say:

They deny that the bill as amended presents any issue of trademark infringement or involves any controversy with reference to plaintiff's alleged trademark "Coca-Cola," and they therefore deny that this suit is brought upon the ground of infringement by them of plaintiff's alleged trademark, "Coca-Cola," in interstate or foreign commerce, or in commerce with the Indian tribes.

II.

For answer to the third paragraph of the amended bill, respondents say:

They deny that either the word "Koke," or the word "Dope," was a commonly and familiarly known and accepted nickname for plaintiff's product, "Coca-Cola," prior to the adoption and use of said words as trademarks for their product by the

respondents and their privies in title. And respondents deny that the public had abbreviated the name "Coca-Cola" into the name "Koke" prior thereto, and they deny the word "Koke" is now or ever was an abbreviation of the words "Coca-Cola." They deny that either the word "Koke" or the word "Dope" indicates, designates or identifies exclusively plaintiff's said product, "Coca-Cola," or that it ever did so. They deny that a request at a soda-fountain, or wherever beverages are on sale, for either "Koke" or "Dope" is understood to be a specific and definite request for plaintiff's product, so intended by the purchaser using the word, or so understood by the dealer, and they deny that either the word "Koke," or the word "Dope," means now, or ever meant, plaintiff's product exclusively. [194] They deny that the word "Koke," or the word "Dope," now means, or ever meant, plaintiff's product at all. On the contrary, neither plaintiff nor any of its predecessors, or alleged predecessors in title, has ever at any time adopted or used either the word "Koke," or the word "Dope," in any manner, way, shape or form as a trademark, trade name or nickname for or designation of, its said product, or as an abbreviation of its alleged trademark "Coca-Cola." And neither it nor any of its predecessors, or alleged predecessors in title, has ever at any time authorized, recognized or countenanced the use of either of said words, "Koke" or "Dope" as a name for, or designation of, its said product. Neither plaintiff nor any of its predecessors, or alleged predecessors in title, has ever at any time affixed either of

said words "Koke" or "Dope" to its product, or to any packages or receptacles containing its said product, nor has it, or any of its alleged predecessors in title, ever advertised its said product in any manner, shape or form under either of said names "Koke" or "Dope" or ever applied either of said names "Koke" or "Dope" to its said product in any manner, shape or form, nor has it, or any of its predecessors, or alleged predecessors in title, ever done anything whatsoever to cause any one to apply either of said names "Koke" or "Dope" to its said product, or to ask for its said product by either of said names, nor has it done anything whatsoever to give either of said names "Koke" or "Dope" a value on the market. On the other hand, both before and since the bringing of this suit, plaintiff has constantly and habitually repudiated said words, as well as any and all other words, save and except the words "Coca-Cola," [195] as a trademark, trade name or nickname for, or designation of its said product, and has notified the public of this repudiation by extensive advertising and otherwise, and has warned the public, through its advertising and otherwise, that the only name it claims for its said product, the only name which identifies and distinguishes its product in the market, and the only name by which its product may rightfully be asked for, is the name "Coca-Cola." Respondents are advised and charge that even if plaintiff had ever in fact adopted or used either the word "Koke" or the word "Dope," as a trademark, trade name or nickname for, or designation of, its said product, or had ever acquired

the right to use either of said words in connection with its said product, as a name therefor, or designation thereof, that right thus acquired would have been lost and abandoned by reason of plaintiff's action in repudiating and abandoning said names, as aforesaid, and all other names or nicknames for its said product, except the name "Coca-Cola." Respondents are advised and charge that if plaintiff ever had any right to use either of said names, "Koke" or "Dope," or to object to the use of them by respondents, plaintiff has estopped itself, by its action in repudiating said names, and advising the public of that fact, from now asserting any such right.

III.

In answer to paragraph IV of the amended bill, respondents say:

That the alleged registration of plaintiff's alleged trademark name, "Coca-Cola," in the United States Patent Office, on the 3d day of January, 1893, and the certificate of registration issued therefor, dated January 31, 1893, are void and of no effect, because [196] respondents are informed and believe, and accordingly state the fact to be, that plaintiff secured the registration of said alleged trademark by fraud, in that neither plaintiff nor any of its predecessors, or alleged predecessors in title, up to that time had ever used the words "Coca-Cola" as a trademark for plaintiff's said product in commerce with any foreign nation, or with any of the Indian tribes.

IV.

In answer to paragraph V of the amended bill, respondents say:

They deny that either the word "Koke" or the word "Dope," considered either by itself or in combination with the dress of plaintiff's said product, "Coca-Cola," does now, or ever did, identify or distinguish plaintiff's said product or point exclusively to the plaintiff as the origin thereof.

V.

For answer to paragraph VI of the amended bill, respondents say:

They deny that either the word "Koke," or the word "Dope," is now, or ever was, a common and familiar abbreviation of plaintiff's alleged trademark name "Coca-Cola," and they deny that either of said words ever meant plaintiff's product exclusively.

VI.

For answer to paragraph VII of the amended bill, respondents say:

They deny that they and their privies in title adopted and began to use the names "Koke" and "Dope" as trademarks for their product after plaintiff's product had [197] become widely and favorably known under said names, and they deny that plaintiff's product is now, or ever was, widely or favorably known under either of said names. And they deny that either of said names does now, or ever did, identify or distinguish plaintiff's said product, or point exclusively to the plaintiff as the origin thereof. Respondents deny that they and their privies in title adopted and began to use said words "Koke" and "Dope" for the fraudulent purpose of enabling their goods to be passed off as and for plain-

tiff's product. Respondents deny that the color of plaintiff's product or the color of its barrels, or the character of dispensing bottles alleged to be furnished to dealers by plaintiff, is now, or ever was, distinctive, or does now, or ever did, identify or distinguish plaintiff's product or point exclusively to the plaintiff as the origin thereof; but, on the other hand, the color of plaintiff's said product, the color of its said barrels, and the character of its dispensing bottles, as aforesaid, are now, and have been common to the trade and in general use by the manufacturers of and dealers in similar beverages for many years and during the entire period of time that plaintiff and its predecessors, or alleged predecessors in title, have been manufacturing and selling plaintiff's product. Respondents deny that the labels with which their product is labeled are similar to the labels with which the plaintiff labels its said product.

VII.

In answer to paragraph VIII of the amended bill, respondents say:

They deny that they are, or that any of them is, engaged in any scheme or plan to pirate upon the reputation of plaintiff's product, or to pass off their goods [198] for plaintiff's good, or to enable dealers, dispensers or bottlers who purchase from them to pass off their product as and for plaintiff's product, either as an extract or syrup or as an aerated beverage.

VIII.

For answer to paragraph IX of the amended bill, respondents say:

They deny that they, or any of them, state to their customers that their syrup is made under the same syrup formula as that under which plaintiff's product is now made, or that their syrup is made by one who is acquainted therewith. It is true, however, that respondents do state at times to customers that their product is made under the direction of one who was formerly acquainted with the original formula under which Dr. Pemberton, the originator of Coca-Cola, made said product, and who had an interest in partnership with Dr. Pemberton in said formula and respondents aver that said statements are true. Respondents deny that they advise or instruct their agents, customers, and dealers in their product, to pass off the same as and for plaintiff's product, or that they countenance any such practice on the part of any of their agents, dealers or dispensers, and respondents deny that their agents, customers or dealers do in fact deceive buyers or purchasers of the same. Respondents deny that the use by them of either the word "Koke," or the word "Dope," or the manner in which they dress their product, has enabled anyone to pass off their product as and for plaintiff's product, or that any customers have been deceived or defrauded by reason thereof. [199]

IX.

For answer to paragraph X of the amended bill, respondents say:

It is true the Koke Company of America claims

to have secured and now to own, certain registrations in the United States Patent Office of the words "Koke" and "Dope" and that the respondents claim the right to use said names as licenses under the Koke Company of America. It is not true, however, that said registrations were secured in fraud of any rights of the plaintiff. It is true that the respondents, for the protection of said trademarks "Koke" and "Dope," have printed warnings on the cards of their traveling men, and on their stationery, to the effect that the Koke Company of America is the owner of said registrations of the words "Koke" and "Dope," in the United States Patent Office, and that any infringement of these registered trademarks will render the party infringing them amenable to prosecution; but it is not true that respondents have threatened persons selling plaintiff's product for the purpose of harassing them, or for the purpose of damaging or embarrassing plaintiff in its business. These statements were printed on the cards and stationery of the respondents for the purpose of protecting themselves against encroachments upon their rights by others, and as a notification to the trade of respondents' rights in the premises. Respondents believed at the time of printing said statements, and now believe in good faith, that said registrations are valid, and that respondents' licensor, the Koke Company of America, is the owner of said trademarks "Koke" and "Dope," and that said Koke Company of America and respondents are entitled to protection in the Courts of the United States

against infringement of them by plaintiff [200] or anyone else.

For further answer to said paragraph X of the amended bill, respondents say:

They have heretofore set up their chain of title to their trademark "Koke" in their answer to the original bill.

With respect to the trademark "Dope," respondents' title is as follows:

In about the year 1903, P. L. Houppert and Samuel H. Worcester, of Birmingham, Alabama, partners, doing business under the firm name and style of "Houppert & Worcester," having acquired a knowledge of the formula from which respondents' predecessors in title had theretofore manufactured their extract, syrup and beverage known as "Koke," began to manufacture, market and sell, in interstate commerce, an extract, syrup and beverage which were substantially identical with the extract, syrup and beverage theretofore manufactured and sold under the name of "Koke," by respondents' predecessors in title, and substantially identical with that which the respondents are now manufacturing and selling under the name of "Dope." At the date of the adoption of said trademark name "Dope," by the said partners, as aforesaid, it was in all respects new, original and distinctive, and had never before been used as a trademark or trade name for merchandise of the same descriptive properties, or of the same class. Thereafter, said partners, as the sole and exclusive owners of said trademark "Dope," continued to manufacture, market and sell in interstate com-

merce their said product under said trademark name "Dope," and to label the receptacles containing their said product with said trademark name, until about the 11th day of May, 1905. On or about said [201] date, said partners made an application, statement and verification, in due form, to the United States Patent Office for the registration of said trademark "Dope," as applied to their product. Thereafter, said partners, as the sole and exclusive owners of said trademark "Dope," continued to manufacture, market and sell, in interstate commerce, their said product under said trademark name, "Dope," in receptacles labeled with said trademark, until about the 6th day of June, 1905, when P. L. Houppert purchased from Samuel H. Worcester all his right, title and interest in and to said partnership business, and the goodwill thereof, including the formula for making said extract, syrup and beverage and the trademark "Dope," and all labels, receptacles, etc., used in connection therewith. Said instrument of conveyance was made in writing and duly recorded in the United States Patent Office, on or about the 6th day of June, 1905. Thereafter, the said P. L. Houppert became and continued to be the sole and exclusive owner of said business and the goodwill thereof, including said trademark name, "Dope," and the formula for making said product, and continued to manufacture, market and sell, in interstate commerce under the name and style of Houppert and Worcester, said same product under said trademark name "Dope," in receptacles labeled with said trademark name until he sold a one-half interest in said

business and goodwill and the formula for making said product, and the trademark "Dope" to E. J. Smiley, and formed the partnership of Houppert and Smiley. Thereafter the said partnership of Houppert and Smiley became and continued to be the sole and exclusive owners of said business and goodwill and of the trademark "Dope," etc., and began and continued to [202] manufacture, market and sell in interstate commerce said same product in receptacles labeled with said trademark until about the fourth day of June, 1907. On or about said date, the application aforesaid, made on May 11, 1905, for the registration in the United States Patent Office of the said word "Dope," as a trademark for said product was duly granted and said name "Dope," was duly registered in the United States Patent Office as a trademark for said product, and a certificate of registration was, on or about that date, granted to the said Houppert & Worcester, under the name and style of "Houppert & Worcester." A copy of said certificate of registration is hereto attached and made a part of this answer, and marked for identification, Exhibit "A-1," to the same. Thereafter, the said Houppert & Smiley, as the sole and exclusive owners of said business and goodwill, including said trademark "Dope," and all registrations of the same in the United States Patent Office, continued to manufacture, market and sell, in interstate commerce, said same product under the trademark "Dope," in receptacles labeled with said trademark until the organization of the National Dope Company, a corporation, organized, chartered and

existing under and by virtue of the laws of the State of Alabama. Thereupon, said Houppert & Smiley, by an instrument in writing, for a valuable consideration, sold, assigned transferred and conveyed to the said National Dope Company all their right, title, claim and interest in and to said business and the goodwill thereof, including the formula for making said product, and the trademark "Dope" and all registrations thereof in the United States Patent Office. Thereafter, said National Dope Company became and continued to be the sole and exclusive owner of said business and goodwill and of said trademark [203] "Dope" and all registrations thereof in the United States Patent Office, and began and continued to manufacture, market and sell in interstate commerce said same product in receptacles labeled with the trademark "Dope" until the name of said corporation was changed to that of the Birmingham Bottling Company. Thereafter, said corporation continued, as the Birmingham Bottling Company, to be the sole and exclusive owners of said business and goodwill and of the trademark "Dope" and all registrations thereof in the United States Patent Office and continued to manufacture, market and sell in receptacles labeled with the trademark "Dope" until about the 6th day of May, 1913. On or about said date, said corporation, by instrument in writing, sold, assigned transferred and conveyed to S. T. Mayfield and J. C. Mayfield all their right, title, claim and interest in and to said business and the goodwill thereof, including the formula for making said product "Dope" and the trademark "Dope"

and all registrations thereof in the United States Patent Office. P. L. Houppert having died in the meantime, and A. E. Campbell and Frank Seiner of Birmingham, Ala., having been duly appointed by the Probate Court of Jefferson County, Alabama, as administrators of the Estate of P. L. Houppert, deceased, and having qualified as such administrators, and as such administrators, having succeeded to whatever right, title, claim or interest the said P. L. Houppert had in and to said business and the goodwill thereof, including the formula for making said product and the trademark "Dope" and all registrations thereof in the United States Patent Office. Said administrators, for a valuable consideration, by an instrument in writing, sold, assigned, transferred and conveyed to S. T. Mayfield and J. C. Mayfield, a partnership doing [204] business under the firm name and style of Mayfield & Mayfield, all right, title, claim and interest of the said P. L. Houppert, deceased, in and to said business and the goodwill thereof, including the formula for making said product, "Dope," and the trademark "Dope" and all registrations thereof in the United States Patent Office. Thereafter, the said S. T. Mayfield and James C. Mayfield, doing business under the firm name and style of "Mayfield & Mayfield," became and continued to be the sole and exclusive owners of said business and goodwill, and of said trademark, "Dope," and all registrations thereof in the United States Patent Office, and began and continued to manufacture, market and sell the extract, syrup and beverage made from said formula, in interstate com-

merce, under said trademark name, in receptacles labeled with said trademark, until about the 26th day of December, 1913, when they sold, assigned, transferred and conveyed unto the Koke Company of America, a corporation, organized, chartered and existing under and by virtue of the laws of the State of Arizona, all their right, title and interest in and to said business and the goodwill thereof, including said trademark "Dope," and all registrations thereof in the United States Patent Office, as well as the formula for making said product. Thereafter, said Koke Company of America became and continued to be the sole and exclusive owner of said business, and the goodwill thereof, and of said trademark "Dope," and all registrations thereof in the United States Patent Office, and of the formula for making said product and began and continued to manufacture, market and sell, in interstate commerce, said same product under said trademark name "Dope" in receptacles labeled with said trademark [205] name, "Dope," until the bringing of this suit, and is now manufacturing, marketing and selling said product, in interstate commerce, under said trademark name, in receptacles labeled with said trademark name, and now owns and conducts said business, and is now the owner of said business and goodwill and the formula for making said product, and said trademark name, and now owns and conducts said business, and is now the owner of said business and goodwill and the formula for making said product, and said trademark name "Dope," and all registrations thereof in the United States Patent Office.

On or about the 30th day of December, 1913, said Koke Company of America duly granted to the respondent, Southern Koke Company, Ltd., a corporation, organized, chartered and existing under and by virtue of the laws of the State of Arizona, an exclusive license to sell said product, "Dope," in the State of Louisiana, and elsewhere, and to use said trademark "Dope," in connection therewith, and respondents were marketing and selling said product at the time this suit was brought, and have been marketing and selling since that time said product under said trademark name, "Dope," by virtue of the authority granted it under said exclusive license from the Koke Company of America.

X.

Respondents, for further answer, say that the plaintiff comes into Court with unclean hands, and should be repelled and denied any relief, because of its own vicious, unfair competition with respondents. Respondents are advised and believe, and accordingly state the fact to be, that the plaintiff now has and maintains, and for sometime past has had and maintained, a large force of [206] detectives, "investigators," law agents and others agents, and that this force has been for sometime past, and is now, kept constantly in the field and on the road, for the purpose of driving respondents from the field of competition, destroying their business and establishing a monopoly. These detectives and agents, under the authority and by direction of the plaintiff, constantly maintain a despicable system of espionage over respondents and their customers, whereby they

and the soft drink trade generally are constantly shadowed and kept under surveillance, and their innermost business secrets and affairs are deliberately and stealthily pried into. By these means, the plaintiff acquires, and has acquired, a knowledge of the condition and affairs of the respondents, the names of their customers, the extent of their business and resources, and the plaintiff has, since said time used and is now using this information unfairly in an attempt to crush respondents. The plaintiff, through its said corps of detectives and agents, and through its competitor's customers, including the customers of respondents, of the beverage they are handling, the quantity thereof, and the manufacturers from whom they purchase the same. Plaintiff's said agents and detectives, acting under its authority and by its direction, go, and have gone, to the respondents' customers and slander and have slandered respondents' business, falsely representing to said customers that the respondents' business is dishonest and fraudulent, and that respondents' products, "Koke" and "Dope," are dishonest and fraudulent products, and only substitutes for plaintiff's product, "Coca-Cola," and that they were designed, [207] by respondents only to be sold as and for plaintiff's said product, "Coca-Cola," and that if the customers persist in handling respondents' product they will be themselves engaging in a dishonest business, and participating in and practicing a fraud upon the public; that no one has a right to manufacture and sell a syrup, extract or beverage similar in color, taste and constituency to plaintiff's

product, "Coca-Cola," except the plaintiff and those acting by and under its authority, and that any one handling any other similar products, especially respondents' product, renders himself amenable to suit at the hands of the plaintiff in the Courts of the United States. And said agents and detectives have threatened, and continue to threaten, respondents' dealers and customers with suits for alleged trademark infringement and unfair competition in the Courts of the United States, if they continue to handle respondents' product and do not immediately agree to quit handling respondents' product, and never again to handle any similar product, in competition with plaintiff's said product. And plaintiff's said agents and detectives, for the sole purpose of harassing, annoying and intimidating respondents' customers, and the trade generally, and of destroying respondents' business, stifling competition and creating a monopoly, have told and continued to tell respondents' customers and the trade generally that the plaintiff has set aside an enormous sum of money for the purpose of prosecuting those who handle respondents' products, and that whether said dealers and customers now agree to quit handling respondents' product or not, in the end they will be forced to give in and handle plaintiff's product [208] exclusively, or be financially ruined, as it would be a useless undertaking for them to attempt to match strength with the plaintiff's tremendous wealth, power and influence. And for the purpose of harassing, annoying and intimidating respondents' customers and the trade generally, and coercing them

to quit handling respondents' product and to handle plaintiff's product, exclusively, plaintiff's said agents have informed them of its said system of espionage, and have notified them that if they handle or sell any other syrup or beverage in competition with plaintiff's product, plaintiff's detectives would soon find it out through its spy system, and that plaintiff would then visit them with prosecutions in the Courts, or else decline longer to sell them its product, and thus destroy such trade as they may have had with customers who happen to desire plaintiff's product in preference to other similar products. Plaintiff has also threatened to discontinue its advertising on the walls of buildings owned or leased by customers, and thus cut off their revenue from these advertisements, if they did not quit handling and selling respondents' product, and sign an agreement not to handle any other similar product in competition with plaintiff's product, and plaintiff has threatened the trade with this punishment if they should have the temerity to begin to handle and sell respondents' products, or any product similar to plaintiff's said product. And plaintiff has sent its local attorneys to respondents' customers, to officially advise them that if they persisted in handling respondents' products, or begin to handle them, they will be subject to suit at the hands of plaintiff, and [209] said attorneys have so advised respondents' customers and the trade generally, and have endeavored to scare them into refusing to handle respondents' products in the future, and to intimidate them into signing a contract to handle plaintiff's product

exclusively. Said attorneys have threatened to bring suit against respondents' customers if they did not comply immediately with the plaintiff's demands, and in order to further coerce and intimidate them, have falsely told them that plaintiff's corps of detectives had secured a mass of convincing evidence, proving conclusively that the clerks of said customers' had been substituting respondents' product as and for plaintiff's product, etc., and that they had better give in rather than run the risk of being defeated in a law-suit, or of incurring the disfavor of the plaintiff. In cases where respondents' customers have refused to be coerced or intimidated by any of these means, plaintiff has filed suit against them in the Federal Courts for alleged unfair competition and trademark infringement. A number of these suits have been filed against respondents' dealers and customers in different parts of the country, not in good faith, or for the protection of any rights of the plaintiff, but simply and solely for the effect they will have upon the trade, and to further harass, annoy, coerce and intimidate respondents' customers and the trade, and thus destroy respondents' business. Although one of these suits has been tried out on its merits and properly dismissed at the plaintiff's cost, plaintiff still continues [210] to prosecute other customers of the respondents, and still continues to unlawfully harass, annoy, coerce and intimidate respondents' dealers and customers. By these and divers other means, the plaintiff, acting through its said corps of detectives and agents, and otherwise, has annoyed, harassed, threatened, in-

timidated, coerced and browbeaten the customers of the respondents into signing a contract with the plaintiff, agreeing not to handle any other product in competition with plaintiff's product, and has forced them to quit handling respondents' product, and by these unfair and vicious means the plaintiff has damaged respondents' business and destroyed a large part of their trade. Not only has plaintiff threatened to boycott respondents' customers if they did not quit handling respondents' product, and threatened to boycott others if they should begin to handle respondents' product, but the plaintiff has so uniformly and habitually carried out its threat not to sell its product, to any customer or dealer who handles respondents' product, or any other similar product, in competition with plaintiff's product, and its other threats, and this has been done so notoriously for the sole purpose of destroying respondents' trade, and the trade of plaintiff's competitors, and for the unfair and vicious purpose of coercing respondents' customers and the trade generally into handling plaintiff's product exclusively, and thereby creating and fostering a monopoly; that the trade throughout the country has become afraid to handle any similar product in competition with plaintiff's product, through fear of the consequences of incurring plaintiff's disfavor, and of being visited with the execution of plaintiff's said [211] threats.

Plaintiff has stationed its agents in front of soda-fountains that were known to be handling respondents' product, and these agents, acting under the authority and by the direction of the plaintiff, have

told the consuming public entering these establishments that plaintiff's product was not on sale there but that the respondents' was, and have falsely told them that respondents' said product was a vile substitute for plaintiff's product, and a cheap imitation thereof, made out of inferior materials, etc., and warned them not to drink it.

On other occasions, when plaintiff's said agents have failed in their efforts to destroy respondents' trade by means of the harassment, intimidations, threats, coercion, etc., heretofore referred to, they have deliberately picked fights with respondents' customers, and then beaten them up with their fists, in retaliation for their refusal to quit handling respondents' product, and for their refusal to sign a contract to handle plaintiff's product exclusively, and this has been done with the knowledge and approval of the plaintiff, and connived at by it, if not done under its express direction.

Notwithstanding the fact that the respondents, The Southern Koke Company, Ltd., and the Koke Company of Texas, are corporations incorporated only under the laws of the State of Arizona, and notwithstanding the fact that their licensor, The Koke Company of America, is a corporation, also chartered only under the laws of the State of Arizona, so that the plaintiff could have sued the Koke Company of America [212] and its licensees, selling by and under its authority, in one suit in the United States District Court for the District of Arizona and obtained full adequate and complete relief in that Court, if entitled to relief; nevertheless, in order to

annoy, harass and embarrass respondents and for the sole purpose of visiting them with a multiplicity of suits and all the annoyance, expense and inconvenience incident thereto, plaintiff brought suit against the Southern Koke Company, Ltd., in the United States District Court at New Orleans, and entered another suit against the Koke Company of Texas, in the United States District Court at Dallas, and another suit against the Koke Company of America in the United States District Court at St. Louis, and then brought this suit against all of said companies in this Court, all of said suits being based upon the same identical alleged cause of action.

As a result of all of these tactics, and as a result of plaintiff's system of espionage, respondents' customers, and the trade generally, have been harassed, annoyed, intimidated, coerced and terrorized by the plaintiff to such an extent that a great many of respondents' dealers have finally decided to quit handling respondents' product and any other similar products, and to handle plaintiff's product exclusively as the easiest and cheapest way to avoid any further such treatment, and the trade generally is afraid to handle respondents' product, for fear of being subjected to similar treatment.

Respondents deny each and every allegation in said amended bill of complaint not hereinbefore expressly [213] admitted, denied or explained, and now having fully answered, pray to be hence dismissed.

THE KOKE COMPANY OF AMERICA,
[Corporate Seal] By J. C. MAYFIELD,
President.

THE SOUTHERN KOKE COM-
PANY, LTD.,
[Corporate Seal] By J. C. MAYFIELD,
President.

THE KOKE COMPANY OF TEXAS,
By _____,
Attorney.

THE KOKE COMPANY OF
ARKANSAS,
By _____,
Attorney.

THE KOKE COMPANY OF
OKLAHOMA,
By _____,
Attorney.

RICHARD E. SLOAN,
JAMES WESTERVELT,
LITTLETON, LITTLETON & LITTLETON,
Solicitors for Respondents. [214]

State of Louisiana,
Parish of Orleans.

J. C. Mayfield, being duly sworn, deposes and says that he is president of the Koke Company of America and of the Southern Koke Company, Ltd., two of the respondents herein; that the said Koke Company of America and Southern Koke Company, Ltd., are corporations, and affiant makes this affidavit in verification for them and in their behalf, and is duly authorized so to do; that he has read the above and

foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

J. C. MAYFIELD.

Sworn to and subscribed before me, this 18 day of March, A. D. 1915.

[Notarial Seal]

EDW. RIGHTOR,
Notary Public. [215]

**Exhibit "A-1" Attached to Answer to Amended
Bill of Complaint—Certificate of Registration of
Trademark.**

(COPY)

No. 63,033.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents shall Come :

This is to certify that by the records of the UNITED STATES PATENT OFFICE it appears that Houppert & Worcester, of Birmingham, Alabama, did, on the 11th day of May, 1905, duly file in said Office an application for REGISTRATION of a certain

TRADEMARK

for a Carbonated Beverage, that they duly filed therewith a drawing of the said TRADEMARK, a statement relating thereto, and a written declaration, duly verified, copies of which are hereto annexed, and have duly complied with the requirements of the law in such case made and provided, and with the regulations prescribed by the COMMISSIONER OF PATENTS.

And, upon due examination thereof, it appearing that the said applicants are entitled to registration

of their said TRADEMARK under the law, the said TRADEMARK has been duly registered to Houppert & Worcester, and their successors or assigns, in the UNITED STATES PATENT OFFICE, this 4th day of June, 1907.

This certificate shall remain in force for TWENTY YEARS, unless sooner terminated by law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the PATENT OFFICE to be affixed, at the City of Washington, this fourth day of June in the year of our Lord, one thousand, nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal]

(Signed) E. B. MOORE,
Commissioner of Patents. [216]

TRADEMARK.

No. 63,033.

Registered June 4, 1907.

HOUPPERT & WORCESTER,
A CARBONATED BEVERAGE.

Application Filed May 11, 1905.

Proprietor:

HOUPPERT & WORCESTER

Per

ARTHUR E. WALLACE,

Attorney. [217]

UNITED STATES PATENT OFFICE.

HOUSSERT & WORCESTER, OF BIRMINGHAM, ALABAMA.

TRADE-MARK FOR A CARBONATED BEVERAGE.

No. 63,033.

Statement and Declaration.

Registered June 4, 1907.

Application filed May 11, 1905.

Serial No. 5,197.

STATEMENT.

to all whom it may concern:

Be it known that we, HOUPPERT & WORCESTER, a firm domiciled in the City of Birmingham, County of Jefferson, and State of Alabama, and doing business at Avenue C and Twenty-second Street, in said City, and composed of the following members, SAM H. WORCESTER and P. L. HOUPPERT, citizens of the United States, have adopted for our use the trade-mark shown in the accompanying drawing.

This trade-mark has been continuously used by us in our business since the year A. D. 1903.

The class of merchandise to which this trade-mark is and has been appropriated in Class 46 Beverages, non-alcoholic, and the particular description of goods comprised in said class to which the said trade-mark is appropriated is a carbonated beverage.

The trade-mark is usually displayed on the packages containing the goods by printing the same on labels which are affixed to bottles containing the goods.

HOUPPERT & WORCESTER,
By SAM H. WORCESTER,
A member of the firm.

DECLARATION.

State of Alabama,

County of Jefferson, ss.

Sam H. Worcester being duly sworn deposes and says that he is a member of the firm of Houppert & Worcester of Birmingham, Alabama, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that he believes the said firm is the owner of the trade-mark sought to be registered, that no other person, firm, corporation, or association to the best of his knowledge and belief has the right to use said trade-mark, either in the identical form or in such

[18]

near resemblance thereto as might be calculated to deceive; that such trade-mark is used by the said firm in commerce among the several States of the United States and that the description, drawing and specimens presented for record truly represent the trade-mark sought to be registered.

SAM H. WORCESTER.

Subscribed and sworn to before me, a notary public within and for said County and State, this 4th day of May, 1905.

[L. s.]

W. H. MOORE,
Notary Public.

[Endorsements]: In the District Court of the United States for the District of Arizona. Coca-Cola Company, v. Koke Company of America et al. Answer to Amended Bill of Complaint. Sloan & Westervelt, Fleming Bldg., Phoenix, Arizona, Attorneys for Defendants. Due service of the within answer is hereby accepted this 2d day of April, 1915. J. E. Morrison, per C. E. John, Atty. for Plaintiff. Filed Apr. 2, 1915, at — M. George W. Lewis, Clerk. By Aileen Russell, Deputy. [219]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

KOKE COMPANY OF AMERICA et al.,

Defendants.

**Minute Entry Appearing Under Date of Tuesday,
April 6, 1915.**

By the consent of the counsel for both the plaintiff and the defendant, IT IS ORDERED that this case be set down for trial at Prescott on August 2, 1915, the plaintiff appearing by J. E. Morrison, Esq., its attorney, and the defendant by Richard E. Sloan, Esquire, its attorney. [220]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Monday,
August 2, 1915.**

This case came on this day regularly for trial at Prescott, State and District of Arizona, it being stipulated by counsel in open court that this case may be heard and tried at Prescott as a Phoenix case. Come now the plaintiff by its counsel, J. E. Morrison, Esquire, and the defendants by their counsel, R. E. Sloan, Esquire, A. B. Littleton, Esquire, and W. F. Norman, Esquire, into open court and both parties announce themselves ready for trial. D. A. Little is duly sworn as Court Reporter in this case. J. E. Morrison, Esquire, then reads aloud plaintiff's amended complaint. A. B. Littleton, Esquire, then reads aloud the defendants' answer. The hour for adjournment having arrived and the trial of this case not having been completed, it is ordered that the further trial of this case be and the same is hereby continued until Tuesday, the 3d day of August, A. D., 1915, at ten o'clock A. M. [221]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Tuesday,
August 3, 1915.**

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, all counsel for both parties being present in open court, D. A. Littleton, Esquire, reads aloud the amended answer of the defendants. Edward S. Rogers, Esquire, makes a brief statement on behalf of the plaintiff and the plaintiff, than to maintain upon its part the issues herein, offers in evidence, depositions of witnesses taken on its behalf, marked Nos. 1, 2, 3, 4, 5 and 6 and Exhibits Nos. 1 to 231, inclusive, which are admitted and filed and treated as read in evidence and called as witnesses, C. A. Meserve and J. J. Kessler, who are duly sworn, examined and cross-examined. Defendants exhibits 232 to 268 inclusive, are offered in evidence, admitted and filed. The hour for adjournment having arrived and the trial of this case not having been completed, it is ordered that the further trial of this case be and the same is hereby continued until Wednesday, the 4th day of August, 1915, at ten o'clock A. M. [222]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

**Minute Entry Appearing Under Date of Wednesday,
August 4, 1915.**

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, all counsel for both parties being present in open court, J. J. Kessler is called to the stand for further examination in chief and cross-examination. Defendants' Exhibits 269 and 274, inclusive, are offered in evidence, admitted and filed. The hour for adjournment having arrived and the trial of this case not having been completed, it is ordered that the further trial of this case be and the same is hereby continued until Thursday, the 5th day of August, A. D. 1915, at the hour of ten o'clock A. M. [223]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

**Minute Entry Appearing Under Date of Thursday,
August 5, 1915.**

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, all counsel for both parties being present in open court. By agreement of counsel, the further trial of this case is continued until Friday, the 6th day of August, A. D. 1915, at the hour of ten o'clock A. M., on account of the absence of a material witness for the defendants who is on his way and expected here today, but who has not yet arrived. [224]

*In the United States District Court for the District
of Arizona.*

No. E—21 (PHX.).

Honorable WILLIAM H. SAWTELLE, District
Judge, Presiding.

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Made Under Date of Friday,
August 6, 1915, at Prescott, Arizona.**

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, all counsel for both sides being present in open court. The defendants to further maintain upon their part the issues herein, call as witness, Wm. Simonson, who is

duly sworn, examined and cross-examined, and offer in evidence exhibits Nos. 275 to 280, inclusive, which are admitted and filed; and thereupon the defendants rest.

Plaintiff then offer in evidence the depositions of N. M. Leaver, John H. Bolins, Herbert G. Marvel, Maurice Wolf, Ernest Higgin and Henry Hartman, and three volumes bound in brown, being testimony taken in rebuttal by plaintiff, which are admitted. The testimony of J. C. Mayfield taken at Chattanooga on July 5th, 1915, is offered as cross-examination by the plaintiff, to which defendants [225] except.

The defendants then move the Court to amend paragraph 24 on page 26 of defendants' answer by adding thereto as follows: "(D) And in that plaintiff's said product, in violation of the Act of Congress of December 17th, 1914, known as the Drug Act, contains a compound or preparation of Coca leaves, which contains cocaine, and plaintiff manufactures and sells its said product, so containing cocaine, to be used as a popular beverage, and which is used as a popular beverage, and not in compliance with the requirements of said act," which motion is allowed by the Court and the defendants given leave to amend their answer as aforesaid. Upon application of defendants showing to the Court that they have not had an opportunity to examine the depositions recently taken by the complainants and for other good cause,

IT IS ORDERED that this case be continued until Monday, the 16th day of August, A. D. 1915, at the hour of ten o'clock A. M., at which time arguments by respective counsel will be had. [226]

*In the United States District Court for the District
of Arizona.*

COCA-COLA CO.,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Monday,
August 16, 1915.**

Pursuant to an order of continuance made on August 6, 1915, trial of this case is this day resumed, counsel for both sides being present in open court. Argument upon behalf of the plaintiff is made by Edward S. Rogers, Esquire. Argument upon behalf of the defendants is commenced by A. B. Littleton, Esquire. The hour of adjournment having arrived and the trial of this case not being completed, it is ordered that the further trial of this case be continued until Tuesday, the 17th day of August, A. D. 1915, at the hour of ten o'clock A. M. [227]

*In the United States District Court for the District
of Arizona.*

COCA-COLA CO.,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Tuesday,
August 17, 1915.**

Pursuant to an order of adjournment made on yesterday, trial of this case is this day resumed, counsel for both sides being present in open court. Argument commenced on yesterday by A. B. Littleton, Esquire, upon behalf of the defendants, is this day resumed and completed. R. E. Sloan, Esquire, commences argument of the case upon behalf of the defendants, but the hour of adjournment having arrived and the trial hereof not being completed, it is ordered that the further trial of the case be adjourned and continued until Wednesday, the 18th day of August, A. D. 1915, at the hour of ten o'clock A. M. [228]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA,

Defendants.

**Minute Entry Appearing Under Date of Wednesday,
August 18, 1915.**

Pursuant to an order of continuance made on yesterday, trial of this case is this day resumed, all counsel for both sides being present in open court. Argument is continued on behalf of the defendant by Richard E. Sloan, Esquire, and on behalf of the plaintiff

by J. E. Morrison, Esquire. The hour of adjournment having arrived and the trial of the case not being completed, it is ordered that the further trial hereof be adjourned and continued until Thursday, the 19th day of August, A. D. 1915, at the hour of ten o'clock A. M. [229]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Thursday,
August 19, 1915.**

Pursuant to an order of adjournment made on yesterday, trial of this case is this day resumed, all counsel for both sides being present in open court. Argument upon behalf of the plaintiff is had by Harold Hirsch, Esquire. The hour of adjournment having arrived and the trial of the case not being completed, it is ordered that the further trial hereof be adjourned and continued until Friday, the 20th day of August, A. D. 1915, at the hour of ten o'clock A. M. [230]

*In the United States District Court for the District
of Arizona.*

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Friday,
August 20, 1915.**

Pursuant to an order of continuance made on yesterday, trial of this case is this day resumed, all counsel for both sides being present in open court, except Messrs. Rogers and Hirsch, who were excused from further attendance owing to the fact that they had previously made arrangements to join their wives at Grand Canyon. The argument of the plaintiffs in reply to the argument of the defendants, by consent of Court, was replied to by A. B. Littleton, Esquire, and R. E. Sloan, Esquire, on behalf of the defendants, and the case submitted to the Court upon the oral argument and briefs that have been filed and taken under consideration by the Court. [231]

*In the United States District Court for the District
of Arizona.*

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.
Defendants.

**Minute Entry Appearing Under Date of Monday,
August 23, 1915.**

IT IS ORDERED by the Court that the two large folders containing the exhibits of the defendants in this case be deposited by the clerk in the vault of the Arizona National Bank of this city, subject to the order of this Court. [232]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Saturday,
September 11, 1915.**

Comes now the plaintiff by R. E. Morrison, Esquire, and asks leave of the Court to withdraw from the files of the clerk Plaintiff's Exhibits Nos. 1 to 50, inclusive, and said request is granted and it is so ordered, such exhibits to be returned to the Clerk on or before the 20th day of October, A. D. 1915, at Phoenix, Arizona. [233]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Monday,
September 13, 1915.**

Comes now the plaintiff by J. E. Morrison, Esquire and asks leave of the Court to withdraw from the files of the Court Plaintiff's Exhibits Nos. 114, 115, 116, 117, 118, 120, 121, 122, 154, 155, 156, 157, 158, 159, and 160 and said request is ordered granted by the Court, such exhibits to be returned to files of this case at Phoenix, Arizona, on or before October 20, 1915. [234]

*In the United States District Court for the District
of Arizona.*

COCA-COLA CO.,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Thursday,
April 20, 1916.**

This case having been heard and submitted, IT IS ORDERED that same be continued under advisement. [235]

*In the United States District Court for the District
of Arizona.*

COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Thursday,
July 6, 1916.**

IT IS ORDERED by the Court that a decree be entered herein in favor of the plaintiff and that counsel for the plaintiff prepare same in accordance with the provisions of the opinion of the Court this day filed herein. [236]

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*In the United States District Court for the District
of Arizona.*

IN EQUITY (PHOENIX).

E—21 (PHX.):

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF ARKANSAS, THE
KOKE COMPANY OF OKLAHOMA,
Defendants.

Opinion.

HAROLD HIRSCH, of Atlanta, Georgia, EDWARD S. ROGERS, of Chicago, Illinois, and JOSEPH E. MORRISON, of Phoenix, Arizona, Solicitors for Complainant.

FRANK F. REED, CANDLER, THOMSON & HIRSCH, of Counsel.

RICHARD E. SLOAN, of Phoenix, Arizona, JAMES W. WESTERVELT, of Phoenix, Arizona, and ANGUSTINE B. LITTLETON, of Chattanooga, Tennessee, for Defendants.

LITTLETON, LITTLETON & LITTLETON, Chattanooga, Tennessee, of Counsel.

SAWTELLE, District Judge:

The bill in this case seeks relief by injunction both preliminary and perpetual, against the defendants because of their joint and several infringement of the plaintiff's trademark—"Coca-Cola"—and for unfair competition on their part. It also asks an accounting of the profits received by defendants, and the assessment of damages sustained by plaintiff.

[237]

The material allegations of the bill, so far as they are necessary to be set forth for the determination of the issues made, are as follows:

The first section of the bill recites the initial manufacture of the syrup known as "Coca-Cola" by J. S. Pemberton, in the year 1886, and traces the title through its various transfers into the plaintiff company on February 22, 1892.

It is alleged that the process and formula for the manufacture of the beverage and syrup styled "Coca-Cola" was new and original and was invented and discovered by plaintiff and its predecessors as a trade and business formula, process and secret, and is now a secret formula and process and not known to the public or others than the plaintiff and its officers and employees and the predecessors of plaintiff.

The second section of the bill charges the continued manufacture of syrup made under the Pemberton formula; alleges that the trademark "Coca-Cola" was, at the time of its adoption by the predecessors of plaintiff, characteristic and distinctive and had never before been used by any one, and has continuously been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar product of others, and that said trademark does now identify and distinguish plaintiff's product. It is further charged that plaintiff's product has been given by the purchasers and consumers thereof certain nicknames, to wit: [238] "Koke" and "Dope," and that each of these words are now and for many years past and prior to the application of either of them to any other beverage recognized and commonly and familiarly used as nicknames for Coca-Cola, and that a request for either is understood, both by the seller and the purchaser, to be a specific and definite request for Coca-Cola and has been so understood and regarded, and acted on both by the seller and purchaser, for many years prior to the manufacture or sale of any other preparation under either of said names; and that at the present

time both dispensers and consumers use these words as a descriptive of the product of plaintiff, and for no other beverage.

The third section of the bill alleges the application to the patent office for the registration of the words "Coca-Cola" as a trademark on May 14, 1892, and the allowance of said application on January 31, 1893, and the issuance of a certificate of registration on that day, which is alleged to be in full force and wholly unrevoked and uncanceled. It is also alleged that on April 23, 1905, under and by virtue of the act of Congress of February 20, 1905, the plaintiff duly applied to the Patent Office of the United States for the registration of the said trademark "Coca-Cola," and complied in all respects with said act and the regulations of the Commissioner of Patents, and thereupon the registration of said trademark "Coca-Cola" was duly allowed for tonic beverages and syrups for the manufacture of such beverages [239] and a certificate of registration No. 47,189, was duly granted to the plaintiff on October 31, 1905, and is still in full force and effect, and that plaintiff is entitled to the sale and exclusive right, both generally and in interstate commerce, to use and employ said trademark on its goods.

The fourth section of the bill alleges the sale of both the syrup and of an aerated beverage, permitted to be manufactured from the syrup by certain licenses of plaintiff, under the trade name, in distinctive receptacles, bottles and barrels and labels, all of which were adopted by plaintiff for the purpose of distinguishing the product of plaintiff from that of other

manufacturers in the same lines.

The fifth paragraph sets up that the plaintiff has expended much time, labor and money in advertising its product. It is alleged that the Koke Company of America was organized under the laws of the State of Arizona about September 15, 1911, and thereafter proceeded in the city of St. Louis to manufacture an unnecessary and deliberate imitation of plaintiff's Coca-Cola syrup, but different therefrom and greatly inferior thereto, and placed the same in barrels and packages similar to those of plaintiff. That said extract is designated by the defendants sometimes as "Koke," and sometimes as "Dope"; that the Koke Company of America ships said imitative extract from the city of St. Louis, usually under the name of "Koke," to the other [240] defendants, and that said extract is used by said defendants as a basis for making a syrup for sale to soda-fountains and bottles which resemble the articles produced by plaintiff, and that the defendants, as a matter of fact, do sell, substitute, and palm off the said syrup and extract as and for the Coca-Cola products of plaintiff. It is alleged that the said imitation product is, with the consent of defendants, sold to the public in substitution for genuine Coca-Cola. It is further charged that the defendants adopted the words "Koke" and "Dope" as a name for their product many years after the words were commonly used to describe the plaintiff's product, and that said adoption was a means to enable them to substitute their product for that of the plaintiff and to reap the benefit of its advertising and labor in dispensing and selling said product.

It is also alleged that the defendants stated, both to bottlers and dispensers, that the syrup they made was produced under the same formula as Coca-Cola, and instructed both dispensers and bottlers to substitute their product when the purchaser desired and intended to obtain Coca-Cola.

It is further alleged that the registration in the patent office of the words "Koke" and "Dope" claimed by defendants was in fraud of the rights of plaintiff, and that the defendants threaten to sue dealers and dispensers who deliver Coca-Cola when "Koke" and "Dope" are called for and when both the dispenser and purchaser design to sell and receive Coca-Cola. [241]

The answer denies all the material allegations of the bill, and after setting up the manner of acquiring title to the trade names "Koke" and "Dope," deny that, at the time they were adopted by their predecessors, they were generally used as a synonym or nickname of plaintiff's product.

The answer then alleges that the plaintiff has been and is now engaged in establishing a monopoly, and that the business of defendants and their patrons is being subjected to a system of espionage by plaintiff and its officers and agents, and agents are using the information thus acquired to impede and harass the customers of defendants, representing that the business of defendants is fraudulent and dishonest and its product inferior imitations of Coca-Cola, and threatening prosecutions if defendants' products are dealt in by its customers.

The answer then alleges that by reason of these

representations and threats many of its customers have ceased to deal in its product, to its damage. It is also contended in the answer that the name "Coca-Cola" was deceptive as a trademark and for that reason was fraudulent, and was but a descriptive name for a product which the plaintiff does not now produce.

Numerous authorities have been cited by both sides, with variant facts, but as each case must be determined on all the facts that surround it, the facts in any prior case cannot be a guide to the decision of the subsequent. This [242] view is cogently pointed out on page three of lectures of John Cutler, of King's College, entitled "Passing Off."

The fundamental principle of the law applicable to this class of cases is well established. It may be thus stated: "No man has a right to pass off his goods as though they were the goods of another."

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another."

Canal Company v. Clark, 13 Wall. 311.

The difficulties which arose are in the application of this principle to the facts of the particular case, and the question which the Court has to decide is always a question of fact. The decision of the Court depends upon all the circumstances affecting the plaintiff and his trade and the circumstances affecting the defendant and his trade, and both alike must be considered in arriving at a conclusion. I quote from a few of the leading cases both English and American.

In the case of *Burgess v. Burgess*, 3 DeG. M. & G. 896, Lord Justice Turner said:

“No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another.”

In the case of *Reddaway v. Banham*, A. C. 199, 13 R. P. C. 224, the Lord Chancellor said:

“My lords, I believe that this case turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes [243] difficult when examining former decisions to disentangle what is decided as fact, and what is laid down as a principle of law. For myself I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else.

How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case, must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof, but if the proof establishes the fact the legal consequence appears to follow.”

In a later case in the House of Lords, referring to

Burgess v. Burgess, the Lord Chancellor made this statement :

“The proposition of law is one which, I think, has been accepted by the highest judicial authority, and acted upon for a great number of years. It is that of Lord Justice Turner, who says, in terms: ‘No man can have any right to represent his goods as the goods of another person. In the application of this kind, it must be made out that the defendant is selling his own goods as the goods of another.’ That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down by Lord Justice Turner is if he were to say in terms, ‘These are the goods manufactured by’ a rival tradesman; and it seems to be assumed that unless he says something equivalent to that no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle or the form of the label, or the nature of the thing sold in the package, he is making the statement not in express words, but in one of those different forms in which the statement can be made by something that he knows will be so

understood by the public. In each case it comes to be a question whether or not there is the statement made; and if the statement is made, there can be no doubt of the legal conclusion that he must be restrained from representing that the goods that he makes are the goods of the rival tradesman. Then you get back to the proposition which I have read from Lord Justice Turner.”

Powell v. Birmingham Vinegar Co., A. C. 710;
44 R. P. C. 727. [244]

“In all cases where rights to the exclusive right of a trademark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities.”

Canal Co. v. Clark, 13 Wall. 311, 322.

“Equity gives relief in such a case, upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacturer of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other

manufacturer, whose reputation is not so high as a manufacturer. Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp; because, by doing so, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would or might be depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy. *Seixo v. Probezende*, Law Rep. 1 Ch., 195.”

McLean v. Gleming, 96 U. S. 245, 251.

“The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another’s use, and this is done, by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trademark must therefore be distinctive in its original signification, pointing to the origin of

the article, or it must have become such by association.”

Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537, 546. [245]

“Every one has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter’s injury. It prohibits the perpetration of such a fraud by the use of descriptive and geographical terms which are not susceptible of monopolization as trademarks as effectually as it prohibits its commission by the use of any other expressions.”

Shaver v. Heller & Merz Co., 108 Fed. 821, 827.

“No person other than the owner of a trademark has a right, without the consent of such owner, to use the same on like articles, because by so doing he would in substance falsely represent to the public that his goods were of the manufacture or selection of the owner of the trademark, and thereby would or might deprive the latter of the profit he otherwise might make by the sale of the goods which the purchaser intended to buy. Where a trademark is infringed

the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trademarks. It is not necessary that a trademark should on its face show the origin, manufacture or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade it has acquired with the public an understood reference to such origin, &c. This doctrine has repeatedly been declared by the Supreme Court, *Canal Co. v. Clark*, 13 Wall. 311, 323; *Manufacturing Co. v. Trainer*, 101 U. S. 5154; *Medicine Co. v. Wood*, 108 U. S. 218, 223, 2 Sup. Ct. 436; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143; *Goodyear's India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 603, 9 Sup. Ct. 166; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 456, 11 Sup. Ct. 396; *Mill Co. v. Alcorn*, 150 U. S. 460, 462, 14 Sup. Ct. 151."

Dennison v. Thomas, 94 Fed. 651, 656.

I think it has been established by the evidence in this case that the plaintiff is the owner of and alone entitled to use the trademark "Coca-Cola" and that its goods alone can lawfully be sold under that name. [246]

It is insisted by the defendants that the words "Coca-Cola" are a mere description of a product, and that it does not describe the product of plaintiff, and consequently does not constitute a valid trademark. This contention was considered in the case of

Coca-Cola Company v. Nashville Syrup Company, 215 Fed. 527, and was there decided adversely to such contention. I think that decision is decisive of the question.

The question of the validity of the trademark "Coca-Cola" and the right of plaintiff to its exclusive use since its registration under the Act of Congress of February 20, 1905, would seem to be placed beyond the pale of contention by the case of Coca-Cola Company v. Deacon Brown Bottling Company, 200 Fed. 105.

I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendants, Koke Company of America and its predecessors, did not adopt or make use of the name "Koke" until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff. *Parker v. Stebler*, 177 Fed. 210, 9th Circuit. [247] *The Barbed Wire Patent*, 143 U. S. 275; *Deering v. Winona Harvester Works*, 155 U. S. 286.

I am convinced that when the witness Mayfield adopted the name "Koke," he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Com-

pany. I further find that the purchase of the trademark "Koke" from the Murphreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

It may be that these resemblances standing alone would not in themselves justify any relief against a person using them in good faith, but when considered in the light of all the evidence in this case, I cannot reconcile them with fairness. The opinion of the Circuit Court of Appeals of the Sixth Circuit in *Coca-Cola Company v. Gay Ola Company* in 200 Fed. on page 723, contains a forcible comment on the state of facts here shown to exist:

"It is first to be *be* observed that defendant is at the best on a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in appearance and taste; and the form of script used in printing the "trademark" names is the same. Even if the use of each of these items of similarity was lawful, when accompanied by good faith and no intent to deceive, they put the product near that dividing line where good or [248] bad faith is the criterion, and their pres-

ence puts upon the user a burden of care to see that deception does not naturally result. Conversely, when we find, as a fact, from the other conduct of the defendant, that the underlying intent is to perpetrate a fraud upon the consumer, this intent must color the accompanying acts, and some which otherwise might be innocent become guilty. So here. The red color used by complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly; but this color has long been used by complainant in a way that was exclusive in this trade. No other manufacturer of analogous or competing drinks uses that color of package, and its adoption by defendant is one of the constituent parts of defendant's scheme of fraud. So, too, with defendant's failure to mark its packages with anything to indicate the place of manufacture. Ordinarily a man may mark his goods, or not, as he pleases; but when he has his marks and labels, which he uses on occasions, and can have no motive for sending out unmarked packages except to aid in a fraudulent substitution, the act, otherwise permissible, becomes forbidden."

The witness Wright of the Southern Koke Company justified the use of the name "Koke," for he says that the name "Koke" was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word "Dope" was adopted for the same purpose. I also find that the defendants' salesmen were in-

structed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola.

A decree is ordered for complainant. Counsel will prepare and tender a decree in accordance with this opinion.

Prescott, Arizona, July 6, 1916. [249]

[Endorsements]: In the District Court of the United States for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Arkansas, The Coke Company of Oklahoma, Defendants. In Equity (Phoenix). Opinion. Filed July 6, 1916. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [250]

In the United States District Court for the District of Arizona.

March Term, A. D. 1916.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS, Defendants.

Decree.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED as follows:

(1) That the Court has jurisdiction of the subject matter and of the parties to the suit.

(2) That the word "Coca-Cola" is a valid trademark.

(3) That plaintiff is the owner of and alone entitled to use the trademark "Coca-Cola" and that its goods alone can lawfully be sold under that name.

(4) That the words "Koke" and "Dope" are each an abbreviation of the word "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product "Coca-Cola."

(5) That the defendant, The Koke Company of America, and its predecessor, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909, and that they had and have no right to its use. [251]

(6) That defendants and their predecessors have no interest in or claim to the trademark "Coca-Cola," the "Coca-Cola" business or formula, and the defendants and their predecessors' claim of interest in the "Coca-Cola" business, the trademark "Coca-Cola" and knowledge of the "Coca-Cola" formula are without foundation.

(7) That the words "Koke" and "Dope" were adopted and used by the defendants and their predecessors with the deliberate purpose of representing

their goods to be the product and manufacture of the Coca-Cola Company.

(8) That the defendants salesmen were instructed to sell and did sell defendants' product under the names "Koke" and "Dope" as and for "Coca-Cola."

(9) That the defendants and each of them, have infringed the plaintiff's trademark, and have been guilty of unfair competition with the plaintiff.

(10) That defendants, the Koke Company of America, the Southern Koke Company, Ltd., the Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, and each of them, their officers, servants, agents, employees, attorneys, licensees, transferees, and assigns, and each and all thereof, and all acting by or under their authority be, and they are each and all perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-Cola," or any like word, or the word "Koke," or any like word, or the word "Dope" or any like word; from [252] claiming or asserting any right in the name "Koke" or in the name "Dope," or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices used by the

defendants and referred to in the bill of complaint herein; from using in connection with the sale or shipment of any product, not the plaintiff's, barrels or receptacles, colored in imitation of the plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by defendants, or any of them, is made from the same formula as Coca-Cola syrup or that defendants, or any of them, know or may rightfully use or employ the Coca-Cola formula; from coloring any product not the plaintiff's in imitation of or like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of the defendants and not of the plaintiff and further, from doing any act or thing, or using any name or names, devices, artifices, or contrivances, which may be calculated to represent that any product not of the plaintiff's production is the genuine *Coca-Cola Cola* of plaintiff, and that writs of perpetual injunction issue accordingly.

(11) That defendants and each of them be required to account to plaintiff for any and all profits derived [253] by them, or any or either of them, and to pay to the plaintiff such damages as it may have sustained by reason of the unlawful conduct of defendants and each of them, and that this cause be referred to a Master in Chancery of this Court, to take and state an accounting to the plaintiff for any and all such profits and any and all of said damages, with full power to subpoena and order the attendance of witnesses, the taking of depositions and the production of books, papers and documents pertinent

to the taking and stating of said account for profits and damages, and to report said account and statement of profits and damages aforesaid as by law provided.

(12) That defendants pay the costs of this suit to be taxed, and that upon taxation plaintiff have execution therefor.

WM. H. SAWTELLE,
Judge.

Dated September 16, 1916.

[Endorsements]: United States District Court for the District of Arizona. The Coca-Cola Company vs. The Koke Company of America et al. Decree. Filed Sept. 16th, 1916. Mose Drachman, Clerk. [254]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,
Plaintiff,
vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF ARKANSAS, THE
KOKE COMPANY OF OKLAHOMA,
Defendants.

**Minute Entry Appearing Under Date of Saturday,
September 16, 1916.**

IT IS ORDERED by the Court that the injunction heretofore granted herein shall be suspended for

a period of thirty days from this date.

AND IT IS FURTHER ORDERED that, if during said period of thirty days an appeal shall have been taken to the United States Circuit Court of Appeals for the Ninth Circuit, said injunction shall be suspended during the pendency of said appeal but for no longer, conditioned upon the defendant filing a bond herein in the sum of \$10,000 as required by Equity Rule 74, said bond to be filed within said thirty days. [255]

*In the United States District Court for the District
of Arizona.*

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

**Minute Entry Appearing Under Date of Monday,
September 18, 1916.**

IT IS ORDERED by the Court that the plaintiff herein be and it is hereby allowed an additional thirty days within which to file its memorandum of costs herein. [256]

*In the United States District Court for the District
of Arizona.*

No. E-21 (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Tuesday,
October 3, 1916.**

IT IS ORDERED by the Court that this case be
continued until the April, 1917, Term of this Court
at Phoenix. [257]

*In the United States District Court for the District
of Arizona.*

No. E-21 (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Wednesday,
October 11, 1916.**

Upon motion of counsel for the defendants
herein, IT IS ORDERED that the former order of
this Court fixing the amount of the supersedeas bond
herein in the sum of \$10,000, be, and the same is
hereby vacated and set aside;

AND IT IS ORDERED that the same be fixed in the sum of \$5,000, conditioned according to law.
[258]

*In the United States District Court for the District
of Arizona.*

No. E-21 (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Minute Entry Appearing Under Date of Saturday,
October 14, 1916.**

Upon motion of counsel for the plaintiff herein, IT IS ORDERED by the Court that said plaintiff be and it is hereby granted thirty days additional time within which to file its cost bill herein. [259]

*In the United States District Court for the District
of Arizona.*

THE COCA-COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS,
Defendants.

Petition for Appeal.

To the Honorable W. H. SAWTELLE, District Judge:

The above-named defendants feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 15th day of September, 1916, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and they pray their appeal be allowed, and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States District Court of Appeals for the Ninth Circuit under the rules of such court in such case made and provided, and your petitioners further pray that the proper order, relating to the proper security be required of them, be made.

RICHARD E. SLOAN,

A. B. LITTLETON,

Attorneys for Defendants.

Appeal allowed and the amount of the appeal bond as required by law is fixed at the sum of \$1,000, said bond to be filed and allowed within ten days from the date hereof. It is further ordered that the injunction granted in the decree in the above [260] entitled cause be suspended pending the appeal in this case to the Circuit Court of Appeals upon the defendants giving a proper bond in the sum of \$5,000 within ten days from the date hereof.

· Dated October 16, 1916.

WM. H. SAWTELLE,
Judge.

· Filed October 16, 1916. Mose Drachman, Clerk.
By R. E. L. Webb, Deputy. [261]

*In the United States District Court for the District
of Arizona.*

No. ——. IN EQUITY.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Defendants.

Assignment of Errors.

And now come The Koke Company of America, The Southern Koke Company, Limited, The Koke Company of Texas, The Koke Company of Oklahoma and The Koke Company of Arkansas, Appellants, and make and file this their assignment of errors, upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the decree made and entered in said cause by this Honorable Court on the 16th day of September, 1916;

I.

· The United States District Court for the District

of Arizona erred in failing to find, hold, adjudge and decree that plaintiff's product to which it has applied the name "Coca-Cola" is misbranded under and within the meaning of the first clause of that division of Section 8 of the Food and Drugs Act of June 30, 1906, which relates to the misbranding of food, because it was established by the greater weight of the evidence: (a) that said product [262] is a "food" within the meaning of said clause of said division of said Section of said Act; (b) that said product is introduced by plaintiff into the several states and is sold, shipped and delivered for shipment by plaintiff from the State of Georgia and from the various other states to various states other than those from which it is thus sold, shipped and delivered for shipment by it; (c) that said product is branded and labelled with the name "Coca-Cola"; (d) that said words "Coca-Cola" as thus employed are a representation of the presence in said food product of the substances coca and cola; (e) that there are substances known as coca and cola under their own distinctive names; (f) that plaintiff's said product contains no coca and no cola; (g) that it is not the substance or article, or a compound or a mixture of the substances or articles, which said name "Coca-Cola" imports and hence (h) that said product is (1) an imitation of the articles or substances coca and cola and (2) is offered for sale under the distinctive names of said articles.

II.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product

is misbranded under and within the meaning of the second clause of that division of Section 8 of said Food and Drugs Act which relates to the misbranding of food, because it was established by the greater weight of the evidence; (a) That plaintiff brands and labels the receptacles containing its said food product, so introduced, sold, shipped and delivered for shipment, by it, as aforesaid, with labels bearing thereupon said name "Coca-Cola" and a pictorial design or picture of coca leaves and cola nuts; (b) that said design or picture together with said name "Coca-cola" [263] are a representation that plaintiff's said food product contains coca and cola; and (c) are a representation that it is composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof; and (d) that plaintiff's said product in fact contains no coca and no cola; and (e) that it is not composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof; and hence (f) that plaintiff's said product is labelled and branded so as to deceive and mislead purchasers.

III.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is misbranded under and within the meaning of the fourth clause of that division of Section 8 of said Food and Drugs Act which relates to the misbranding of food, because it was established by the greater weight of the evidence; (a) That the packages containing plaintiff's said food product, so introduced,

sold, shipped and delivered for shipment, by plaintiff as aforesaid, and their labels, bear both a statement, and a design or device, regarding the ingredients or substances therein contained, to-wit, said words "Coca-Cola" and said pictorial design or picture of coca leaves and cola nuts, which said statement and which said design or device, are misleading, in that they lead to the belief; (b) that the substances or articles, coca and cola, are present in plaintiff's said product, when in fact they are not; (c) that plaintiff's said product is composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof, when in fact it is [264] not; (d) that said substances or articles coca and cola or extracts derived therefrom containing the principal characteristic derivatives thereof, are present in plaintiff's said product in substantial and appreciable quantities when in fact they are not; (e) that said substances or articles coca and cola, or said extracts so derived, as aforesaid, really and in fact perform important essential functions in plaintiff's said product, materially and substantially tend to characterize and distinguish it, and appreciably and materially contribute either to its color, appearance, taste, flavor, odor, aroma or stimulating qualities or materially and appreciably tend to produce or materially and appreciably contribute to the production of, the capacity or ability of said product to cause, or produce, its characteristic physiological effects upon those who drink and consume it, when in fact they do not.

IV.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is misbranded under and within the meaning of the latter portion of the second clause of that division of Section 8 of said Food and Drugs Act which relates to the misbranding of food, because it was established by the greater weight of the evidence; (a) that plaintiff's said food product so introduced, sold, shipped and delivered for shipment, by plaintiff, as aforesaid, contains (1) cocaine, (2) alpha and beta eucaine, and (3) derivatives of said substances; and (b) fails to bear a statement on the labels attached thereto or to the receptacles containing it, of the quantity or proportion of such cocaine, or of such alpha and beta eucaine, or of any [265] of the derivatives of any of said substances contained therein.

V.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is adulterated under and within the meaning of the second clause of that division of Section 7 of said Food and Drugs Act which relates to the adulteration of food, because it was established by the greater weight of the evidence: (a) that plaintiff's said food product, so introduced, sold, shipped and delivered for shipment, by plaintiff, as aforesaid, contains, as an added ingredient, a large percentage of caffeine; (b) that said caffeine so contained in said product is not derived from coca leaves or cola nuts, but it is derived from tea leaves, coffee beans and other

sources; and (c) that said caffeine so derived has been substituted in plaintiff's said product, either wholly or in part (1) for cola and (2) for extracts derived from cola, or the cola nut, containing the principal characteristic derivatives thereof.

VI.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is adulterated under and within the meaning of the third clause of that division of Section 7 of said Food and Drugs Act which relates to the adulteration of good, because it was established by the greater weight of the evidence that the substantial and valuable constituents of (1) coca and cola and (2) extracts derived therefrom containing the principal characteristic derivatives thereof, have been wholly, or in part, abstracted from plaintiff's said product, so introduced, sold, shipped and [266] delivered for shipment, by plaintiff, as aforesaid.

VII.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's said product is adulterated under and within the meaning of the fifth clause of that division of Section 7 of said Food and Drugs Act which relates to the adulteration of food because it was established by the greater weight of the evidence; that plaintiff's said product, so introduced, sold, shipped and delivered for shipment, by plaintiff, as aforesaid, contains, as an added ingredient a large percentage of caffeine which is a poisonous and deleterious substance and ingredient and which renders plaintiff's said product injurious to health.

VIII.

That said District Court erred in failing to find, hold, adjudge and decree that plaintiff misrepresents the nature, character, quality, contents and ingredients of its said product and deceives and defrauds the public with respect thereto, because it was established by the greater weight of the evidence:

1. (a) Plaintiff labels and brands its said product and the receptacles containing it with the name "Coca-Cola" and with a pictorial design or picture of coca leaves and cola nuts and (b) that said name "Coca-Cola" is a descriptive name and purports to describe essential ingredients of said product; (c) that said name "Coca-Cola" together with said pictorial design or picture induces the belief in the mind of the public and in the minds of purchasers (1) that plaintiff's said product is a beverage, the essential characteristic ingredients of which are coca and cola, or extracts derived therefrom [267] containing the principal characteristic derivatives thereof, when in fact it is not; (2) that said coca and cola, or said extracts so derived, are present in said product in substantial and appreciable quantities when in fact they are not; (3) that they perform essential functions therein and materially and appreciably tend to characterize and distinguish said product, when in fact they do not.

2. That plaintiff represents to the public, through its advertising and otherwise: (a) that its said product is composed essentially of coca and cola, or of extracts derived therefrom containing the principal characteristic derivatives thereof, when in fact is

not; (b) that the substances coca and cola, or said extracts so derived therefrom, are present in said product in substantial and appreciable quantities, when in fact they are not; (c) that said substances coca and cola, or said extracts so derived therefrom, perform important essential functions in said product, and materially and appreciably tend to characterize and distinguish it, when in fact they do not.

3. That plaintiff represents to the public, through its advertising and otherwise, that its said product is wholesome and healthful, that it is perfectly harmless and free from injurious tendencies, and that it is not injurious or deleterious to health, when, as a matter of fact, said product is not wholesome or healthful, but has injurious tendencies and is, in fact, injurious and deleterious to health.

4. That plaintiff represents to the public, through its advertising and otherwise, that its said product is pure, when in fact it is adulterated, as shown in assignments V, VI and VII, *supra*, and frequently contains impurities and other foreign substances such as insects, rodents [268] dust, grit, filthy decomposed and putrid animal and vegetable substances and other like impurities.

5. That plaintiff represents to the public, through its advertising and otherwise, that its said product does not contain cocaine, when in fact it does contain cocaine.

6. That plaintiff represents to the public, through its advertising and otherwise, and by the application of the name "Coca-Cola" to its product, that said product is identically the same product that plain-

tiff has always manufactured and sold under said name, and that it is identically the same product that Dr. Pemberton originally made and sold in Atlanta, Georgia, in 1886 and 1887, when in fact it is not, because essential constituent ingredients of the original product, as originally made by plaintiff, and as originally made by the said Dr. Pemberton, are not now present in plaintiff's said product, and plaintiff's said product contains essential constituent ingredients which said original product did not contain.

IX.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's business is unlawful, in that it is conducted in violation of sections 1, 2, 4 and 8 of the Act of December 17th, 1914, commonly known as the Harrison Anti-Narcotic Act, because it was established by the greater weight of the evidence:

1. That plaintiff's said product consists of, or contains, a compound, mixture, salt, derivative or preparation of coca leaves which have not been decocainized, which said compound, mixture, salt, derivative or preparation contains cocaine.

2. That plaintiff's business consists (a) in producing, manufacturing, compounding, mixing, dealing in, [269] selling, distributing and dispensing said product, (b) in having it in his possession and under its control, and (c) in sending, shipping, carrying and delivering same from the State of Georgia and from various other States, to persons in various States other than those from which it is thus sent,

shipped, carried and delivered by plaintiff, and to persons in the District of Columbia.

3. That plaintiff has never at any time (a) registered with the Collector of Internal Revenue of any District its name or style, place of business or the place or places where its said business is carried on, or (b) paid to such Collector of Internal Revenue the special tax of one dollar, as required and provided for by Section 1 of the Act of December 17th, 1914, commonly known as the Harrison Anti-Narcotic Act.

4. That plaintiff sells, ships, and distributes said product in commerce among the several States, and between the several States and the District of Columbia, and sells and dispenses it in such commerce to the public generally as a popular beverage, and to be used and consumed as such, and that such sales are not, and have never been, made in pursuance of any written order of the person to whom said article is, or has been, sold, as aforesaid, or any form issued in blank for that purpose by the Commissioner of Internal Revenue, as required by Section 2 of said Harrison Anti-Narcotic Act.

X.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff's business is unlawful, in that it is conducted in violation of Section 3 of the Act of October the 15th, 1914, commonly known as [270] the Clayton Anti-Trust Act and consists in the open, flagrant and habitual violation thereof, because it was established by the greater weight of the evidence:

1. The plaintiff is engaged in commerce among

the several States within the meaning of Sub-section 2 of Section 1 of the Act of October 15th, 1914, commonly known as the Clayton Anti-Trust Act, and within the meaning of Section 3 of said Act.

2. That its business consists of making sales, and contracts for the sale, of its product in the course of such commerce for use, consumption and resale within the United States and the District of Columbia.

3. That said sales, and contracts for the sale, of its said product, in the course of such commerce, are constantly and habitually made upon the condition, agreement and understanding that the purchasers of said product will not use, or deal in, the goods, wares and merchandise of any of plaintiff's competitors, and that the making of such sales and of such contracts of sale, upon such condition, agreement and understanding, is the regular course of business by which plaintiff markets its said product.

4. That in the regular course of plaintiff's said business, plaintiff fixes the price of its said product, and discounts from, and rebates upon, such price, upon the condition, understanding and agreement that purchasers of its said product will not buy, use, handle, sell, or deal in, the goods, wares and merchandise of its competitors.

5. That the effect of such sales and contracts for such sales, and of such agreements, conditions and understandings, of the fixing of the price charged for its [271] said product, and of the discounts from, and rebates upon, such price upon the condition, agreement and understanding aforesaid, is to sub-

stantially lessen competition, and to tend to create a monopoly in the plaintiff of the cola beverage industry in trade and commerce among the several States and between the several States and the District of Columbia.

X.

The said District Court erred in failing to find, hold, adjudge and decree that plaintiff has openly, flagrantly and habitually, as a part of its regular course of business, violated Sections 1 and 2 of the Act of July 2, 1890 (26 Statutes at Large, 209), commonly known as the Sherman Anti-Trust Act, and that, therefore, its business is unlawful, because it was established by the greater weight of the evidence that, for the purpose of destroying defendants' business and the business of its numerous other competitors, and for the purpose of unlawfully monopolizing the trade in cola beverages in commerce among the several States, plaintiff has:

1. Combined and conspired and contracted and agreed with numerous soft drink dealers throughout the country to restrain the commerce in cola beverages by abstaining from buying, handling, using, selling or dealing in any product like the plaintiff's except that of plaintiff's manufacture.

2. Boycotted and blacklisted those dealing in defendants' product, and the products of plaintiff's other competitors, who have refused to combine and conspire, or to contract and agree with plaintiff as aforesaid, and plaintiff has refused and declined to sell them its product so long as they persisted in handling defendants' [272] products or any of

the said other competitive products.

3. Slandered and libelled those dealing in defendants' products, and in the products of plaintiff's other competitors, to their customers, and to the public generally in their respective communities, by uttering and publishing in writing of and concerning them, false and malicious statements and writings to the effect that said dealers are dishonest and engaged in deceiving and defrauding their customers, that defendants' product and said other competitive products which they handle and sell are dishonest and fraudulent products, made of cheap, inferior and harmful materials, and are poisonous and deleterious to health, that in handling said products said dealers are violating the law and infringing upon plaintiff's trade rights, thereby rendering themselves amenable to law and subjecting themselves to severe and costly penalties.

4. Slandered and libelled defendants and their business to their customers, present and prospective and to the public generally by uttering and publishing in writing of and concerning them false and malicious statements and writings similar to those set forth in paragraph 3, *supra*.

5. Maliciously threatened suits against, and prosecution of those dealing in defendants' product and in the products of plaintiff's other competitors, for alleged infringements of plaintiff's alleged trademark and for alleged unfair competition, because of the fact that they were handling and selling said competitive products; and otherwise intimidated, coerced and browbeaten them.

6. Brought numerous vexatious and frivolous suits against those dealing in defendants' product, and in the products of plaintiff's other competitors, not in good [273] faith, but simply and solely to harass and annoy the said dealers and make it unprofitable for them to continue to handle said competitive products.

7. Sent its agents and detectives to picket the stores and places of business of those dealing in defendants' product and in said other competitive products and to pry into their business secrets, and has sent its agents and detectives to defendants' place of business and to the places of business of its other competitors to acquire by fraud and stealth their lists of customers, business secrets, commercial plans, financial status and the volume of business done by them, in order to gain an unfair advantage over them and thus facilitate its efforts to hinder, restrain and destroy their business.

8. Sent its agents and detectives to spy upon railroad offices and freight depots and to trace shipments of goods from defendants' plant and from the plants of plaintiff's other competitors to their customers, and has sent its said agents and detectives out to shadow and follow defendants' salesmen and the salesmen of plaintiff's other competitors, and to endeavor, by means of threats, coercions, intimidations and otherwise, to procure the cancellation of orders for said competitive products secured by said salesmen, and by said means has procured the cancellation of many such orders, and has injured and almost destroyed defendants' business, and has thus

substantially restrained trade and commerce.

9. Carried on a general commercial campaign of terrorism and waged relentless trade war of "frightfulness" in order to exterminate competition and to acquire an unlawful monopoly. [274]

XII.

The said District Court erred in finding, holding, adjudging and decreeing that plaintiff's mark "Coca-Cola" is a valid trademark, that the plaintiff is the owner of and alone entitled to use said mark, and that its goods alone can lawfully be sold under that name, because:

1. Said mark is used by plaintiff in an unlawful business within the meaning of Section 21 of the Trademark Act of February 20, 1905, as amended: (a) in that it is used by plaintiff in interstate commerce upon an article of food which is misbranded, as set forth in assignments I, II, III, and IV, *supra*; (b) in that the use of said mark by plaintiff in interstate commerce as a trademark for, or as a brand upon, plaintiff's said product, constitutes a misbranding of the same, as set forth in said assignments I, II, III and IV, *supra*; (c) in that said mark is used by plaintiff in interstate commerce, upon an article of food which is adulterated, as set forth in assignment V, VI and VII, *supra*; (d) in that said mark is used by plaintiff in interstate commerce upon an article which contains cocaine, in violation of Sections 1, 2, 4 and 8 of the Harrison Anti-Narcotic Act, as set forth in assignment IX, *supra*; (e) in that said mark is used by plaintiff in its business, which is carried on in open, flagrant and habitual violation

of Section 3 of the Clayton Anti-Trust Act, as set forth in assignment X, *supra*; (f) in that said mark is used by plaintiff in its business, which is carried on by means of combinations and conspiracies and contracts and agreements in restraint of trade in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, as set forth in assignment XI, *supra*; (g) in that said mark is used by plaintiff in its business, [275] which consists in part of an attempt to monopolize the trade in cola beverages in commerce among the several States in violation of said Section 2 of said Sherman Anti-Trust Act, as set forth in said assignment XI, *supra*.

2. Said mark is used by plaintiff upon an article injurious in itself, as set forth in assignment VII, *supra*.

3. Said mark is used by plaintiff with the design to deceive the public in the purchase of its said product as set forth in assignments I, II, III, IV and VIII, *supra*.

4. It was established by the greater weight of the evidence that said mark "Coca-Cola" is a descriptive word and purports to describe plaintiff's said product and the nature, character, quality, contents or ingredients thereof, and that said mark was not in the actual and exclusive use of plaintiff, or of its predecessors in title, as a trademark for its said product, during the whole of the ten years next preceding the passage of the Trademark Act of February 20th, 1905.

5. It was established by the greater weight of the evidence that said mark "Coca-Cola" is a deceptive

mark, in that it falsely describes plaintiff's said product and the nature, character, quality, contents or ingredients thereof, as set forth in assignments I, II, III, IV and VIII, *supra*.

XIII.

The said District Court erred in finding, holding, adjudging and decreeing that this suit can be maintained to the extent that it seeks any relief under the provisions of the Trademark Act of February 20, 1905, as amended and to the extent that it seeks any relief predicated upon the theory that plaintiff's mark "Coca-Cola" is a valid trademark, because said mark is invalid [276] as a trademark for the reasons set forth in assignment XII, *supra*, and, not being a trademark, it cannot be infringed as such.

XIV.

That said District Court erred (1) in failing to dismiss plaintiff's bill to the extent that it seeks any relief under the provisions of the Trademark Act of February 20, 1905, as amended, and to the extent that it seeks any relief upon the theory that plaintiff's mark "Coca-Cola" is a valid trademark, because said mark is invalid as a trademark, and is used by plaintiff in an unlawful business, upon an article which is injurious in itself, with the design to deceive the public in the purchase of merchandise, as set forth in assignments I to XII, inclusive, *supra*; and (2) in failing to adjudge the costs of the cause, to that extent, against the plaintiff.

XV.

The said District Court erred in finding, holding, adjudging and decreeing that defendants' mark

“Koke” and defendants’ mark “Dope” infringe plaintiff’s mark “Coca-Cola” as a trademark:

1. Because under the pleadings in this case, as amended, there was no issue requiring or authorizing a determination of any such question.

2. Because plaintiff’s said mark “Coca-Cola” is invalid as a trademark for the reason set forth in assignments I to XII, inclusive, *supra*, and cannot therefore be infringed as a trademark.

3. Because there was no evidence to sustain said finding.

4. Because said finding was against the greater weight of the evidence. [277]

5. Because it was established by the greater weight of the evidence that defendants’ predecessors in title, exclusively owned and used the mark “Coca-Cola” and the business and goodwill connected therewith, and exclusively manufactured and sold “Coca-Cola” under said mark, prior to the time when plaintiff’s predecessors in title first adopted and began to use said mark, and that defendants’ predecessors in title, adopted and began to use the mark “Koke” as a trademark for their said product either prior to, or contemporaneously with the adoption and use of said mark “Coca-Cola” by plaintiff’s predecessors, and that they and their successors have continuously so used the same ever since then down to the present time, so that even if the mark “Koke” should be thought to be an infringement of the mark “Coca-Cola,” nevertheless at the time the alleged infringement began defendants’ predecessors were guilty of nothing more heinous than infringing a

mark which they themselves had the right to use and which they had previously used, and, having had the right to use the mark "Coca-Cola," itself, they violated no rights of the plaintiff in using a mark which infringed the same.

XVI.

The said District Court erred in finding, holding, adjudging and decreeing that defendants' marks "Koke" and "Dope" are each an abbreviation of plaintiff's "Coca-Cola":

1. Because there was no evidence to sustain said finding.

2. Because said finding was against the greater weight of the evidence.

3. Because said finding is an absurdity. [278]

XVII.

The said District Court erred in perpetually enjoining and restraining the defendants and their officers, agents, servants, employees, attorneys, licensees, transferees and assignees, and all acting by or under their authority, from using or employing in connection with the manufacture, advertisement, offering for sale or sale of any product not being that of plaintiff's manufacture, the word "Coca-Cola" or any like word:

1. Because there was no allegation in the bill of complaint, as amended, that defendants had ever wrongfully or unfairly used or employed said word "Coca-Cola" or any like word, in connection with the manufacture, advertisement, offering for sale or sale of any product not being that of plaintiff's manufacture; the word "Coca-Cola" or any like word.

1. Because there was no allegation in the bill of complaint, as amended, that defendants had ever wrongfully or unfairly used or employed said word "Coca-Cola," or any like word, in connection with the manufacture, advertisement, offering for sale or sale of any product not being that of plaintiff's manufacture.

2. Because there was no evidence to sustain the finding that defendants had ever wrongfully used or employed said words "Coca-Cola" in such connection.

3. Because said finding was against the greater weight of the evidence.

4. Because it was established by the greater weight of the evidence that said word "Coca-Cola" is not a valid trademark, as set forth in assignments I to XII, inclusive, *supra*, and that it is a descriptive word purporting to describe plaintiff's product and its nature, character, [279] quality, contents or ingredients, and hence that plaintiff is not entitled to its exclusive use, or to absolutely and unconditionally enjoin and restrain others from using it, regardless of whether it is used by them fairly and honestly, or otherwise.

5. Because said injunction is broader than the pleadings or the testimony warrant, in that it absolutely and unconditionally enjoins and restrains the defendants, their officers, agents and so forth, from using or employing said word "Coca-Cola" or any like word at all in any manner whatever for any purpose whatsoever, in connection with the manufacture, advertisement, offering for sale, or sale of

any product not being that of plaintiff's manufacture, without regard to the character or circumstances of such use and regardless of whether or not it is used rightfully, fairly and honestly, or otherwise—that is to say, it enjoins and restrains them, for instance, from stating that defendants' product is like or resembles "Coca-Cola" or is an imitation of "Coca-Cola." or is better than or superior to "Coca-Cola," or that it is manufactured under the direction of a man who was formerly in partnership with the person who invented "Coca-Cola" or is sold at wholesale at a less price than "Coca-Cola," etc. etc.

XVIII.

The said District Court erred, and was guilty of an abuse of discretion in passing the order entered on the 20th day of February, 1915, granting the plaintiff leave to amend its bill of complaint:

1. Because the amendment changed the cause of action from one for the infringement of a trademark to one for unfair competition, pure and simple, and was a radical [280] departure from the theory of the case as presented in the original bill of complaint and necessitated a different line of defense and required a new and extensive investigation into the facts, and the production of evidence different in character and volume from that called for under the issues raised by said original complaint.

2. Because no good and sufficient reason was shown for making said amendment at the time same was sought and allowed.

3. Because it worked a hardship and an injustice upon the defendants, for the reason that at the time

of said amendment plaintiff had taken all its testimony in chief, and the defendants had begun to take their testimony, and at the time of the taking of plaintiff's said testimony in chief the counsel for the defendants were unprepared to intelligently cross-examine the witnesses as to the facts relating to the new allegations made in and the new issues introduced by said amended complaint.

4. Because said amendment was allowed without requiring plaintiff to pay the costs of the cause up to that time, and without the imposition of any terms whatever. [281]

XIX.

The said District Court erred in finding, holding, adjudging and decreeing that defendants have no right to use either the word "Koke" or the word "Dope," and in perpetually enjoining and restraining them, and each of them, their officers, agents, and employees, etc., from using or employing in connection with the manufacture, advertisement, offer for sale or sale of any product not being that of plaintiff's manufacture, the word "Koke" or any like word, or the word "Dope" or any like word, and from claiming or asserting any right in said name "Koke" or said name "Dope";

1. Because it was established by the greater weight of the evidence that defendant's predecessors in title were the first to adopt and use the words "Koke" and "Dope" as trademarks for their said product, and that they and the defendants have continuously used the same ever since, and are, therefore, the owners of the same and entitled to their ex-

clusive use as trademarks for their said product.

2. Because it was established by the greater weight of the evidence that the defendant's predecessors in title enjoyed the actual and exclusive use of the said mark "Koke" as a trademark for their said product during the whole of the ten years next preceding the passage of the Trademark Act of February 20, 1905, and that, therefore, they are entitled to register said mark as a trademark under the terms of said Trademark Act; and hence that said mark is a valid trademark within the meaning of said Act, and its use by the defendants as such trademark is authorized by, and afforded protection under, said Act.

3. Because it was established by the greater weight of the evidence that the words "Koke" or "Coke" and "Dope," as used by the public and by purchasers in asking for the drinks to which they are applied by them, and as understood by dealers, dispensers and the public generally, are purely descriptive words having reference [282] solely to the nature, character, quality, contents or ingredients of such drinks, or to the popularly supposed physiological effect produced thereby, and having no reference whatever to origin, ownership, selection or manufacture, and are when so used in this sense, as distinguished from their use as a mark or brand upon goods, generic or *publici juris*.

4. Because it was established by the greater weight of the evidence, and formally admitted of record, that neither plaintiff nor any of its predecessors, has ever, at any time, used or employed, or authorized the use

or employment of, either of said words "Koke" or "Dope," in any manner, for any purpose, in connection with the manufacture, advertisement, offering for sale or sale of its said product, but that, on the other hand, plaintiff has openly, publicly, and notoriously, through its advertising and otherwise, repudiated said words on every hand.

5. Because it was established by the greater weight of the evidence that neither said word "Koke" nor said word "Dope" deceptively resembles any mark or brand used by plaintiff upon, or in association with, its said product.

6. Because it was established by the greater weight of the evidence and admitted, that plaintiff has never used or employed either of said words "Koke" or "Dope," or authorized their use or employment, in any manner for any purpose, in connection, or association with, the sale of its product, and that plaintiff does not claim, and has never claimed, any trademark rights therein, or any right to their exclusive use, and that plaintiff is not in fact entitled to their exclusive use.

7. Because, if plaintiff had ever in fact acquired any right to the exclusive use of either of said words, its action in openly, publicly, and notoriously repudiating them constitutes an abandonment thereof, and a dedication to the public of any such rights [283] therein.

8. Because said injunction prohibits the sale of defendant's product when it is asked for by words aptly and appropriately descriptive thereof, and by the words most generally used to designate that char-

acter of commodity, and therefore, practically prohibits the sale of defendants product altogether, and gives plaintiff a practical monopoly of the entire class or type of drinks to which its drinks and defendants drinks belong.

9. Because said injunction is broader than is warranted by the pleadings or the evidence in that it absolutely enjoins and restrains defendants, their officers, agents, etc., from using or employing the word "Koke" or any like word, or the word "Dope" or any like word at all, in any manner, for any purpose whatever, in connection with the manufacture, advertisement, offering for sale or sale of any product not being that of plaintiff's manufacture, thus affording plaintiff all protection of a valid, technical trademark in words which plaintiff has never used or employed, which it has openly and publicly and notoriously repudiated on every hand and which are common generic terms, purely descriptive of the class or type of drinks to which they are applied, having no reference whatever to origin, ownership, selection or manufacture, and in which, therefore, plaintiff has no right to a monopoly, but which defendants and all the world may fairly and lawfully use without invading any rights of the plaintiff therein.

10. Because said injunction is broader than is warranted by the pleadings or the evidence in that it is not limited so as to merely enjoin any unfair use of the word "Koke" or any like word, or of the word "Dope" or any like word, or the use of them so as to convey any secondary meaning they may have ac-

quired, but absolutely enjoins any use of them at all, in connection with the manufacture, advertisement, offering for sale or sale of any product other than that of plaintiff's manufacture, in any manner, for any purpose whatever, [284] regardless of whether such use is fair or unfair or is confined to the primary descriptive meaning thereof or otherwise.

11. Because there was no evidence to sustain the finding that defendants have used said word "Koke" or said word "Dope" or any like word or words unfairly, the mere use of them by defendants and not any unfair use thereof, being all that was established.

12. Because it was established by the greater weight of the evidence that defendants have not used the said words or any like word or words unfairly, the mere use of them by the defendants, and not any unfair use thereof, being all that was established.

13. Because said injunction is broader than is warranted by the pleadings and the evidence in that it not only enjoins defendants, their officers, and agents, etc., from using the words "Koke" and "Dope" but also enjoins them from making any use whatever of any like word or words, and in as much as said words "Koke" and "Dope" are descriptive of the class or type of drinks to which they are applied, any other word or words that aptly described said class or type of drinks would necessarily have conveyed the same meaning, and, therefore, would be a like word or such like words, and hence said injunction enjoins said defendants from de-

scribing their product by any words whatever.

14. Because it was established by the greater weight of the evidence, and was not disputed, that plaintiff had silently acquiesced in the use of said words by defendants and their predecessors for many years and had never taken any steps whatever to assert any right, or claim or interest therein, and had never questioned the right to use said words in the manner in which defendants used them, or complained of such use as unfair, until the bill was filed in this case, and hence that plaintiff is estopped by its acquiescence and laches from now complaining of defendants' use of said words.

XX.

The said District Court erred in finding, holding, adjudging and decreeing that the words "Koke" and "Dope" are each used [285] by the public and by purchasers in designating plaintiff's product.

1. Because it was established by the greater weight of the evidence; (a) that said words "Koke" and "Dope" are each descriptive in character; (b) that their use by the public originated in the assumption or supposition that the drinks to which they were applied contained cocaine or some other potent drug of like character; (c) that said words were used by the public originally to describe or designate the nature, character, quality, contents or ingredients of the class of drinks to which they were applied, or the popularly supposed physiological effects produced thereby; and (d) that the use of said words by the public and by purchasers ever since then and down to the present time has continued and

spread upon said assumption or supposition, and said words have been used by the public and by purchasers ever since then down to the present time, and are now used by them, merely to describe or designate the nature, character, quality, contents or ingredients of the class of drinks to which they are applied or the popularly supposed physiological effect produced thereby.

2. Because it was established by the greater weight of the evidence that neither said word "Koke" nor said word "Dope" is now, or ever was, used by the public or by purchasers to designate plaintiff's product exclusively, or to indicate or designate plaintiff as the source or origin of the drinks to which they are and have been applied, but that said words are now, and have been for many years, used by the public and by purchasers to designate generically the class or type of drinks to which plaintiff's drink and defendant's drink and hundreds of other similar drinks of others belong.

XXI.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from interfering or threatening any prosecution, or interfering with the use of said names "Koke" and "Dope" as short names or nicknames of plaintiff's product: [286]

1. Because it was established by the greater weight of the evidence that said words "Koke" and "Dope" are not short names or nicknames for plaintiff's product exclusively, but are common generic descriptive terms used by the public and by pur-

chasers to designate a class merely and not origin.

2. Because it was established by the greater weight of the evidence that the action of the defendants in interfering with plaintiff's attempt to monopolize said names was taken in good faith and in the honest belief that said words, as used and employed by them, were valid trademarks and that the defendants were entitled to the exclusive use of same as their trademarks, and for the sole purpose of protecting what they honestly believed to be their rights and not to take any unfair advantage of the plaintiff or to unfairly compete with it.

3. Because it was established by the greater weight of the evidence that notwithstanding the fact that plaintiff has never used or employed said words "Koke" or "Dope" and that said words, as used and employed by the public in asking for soft drinks, are purely descriptive and therefore, *publici juris*, nevertheless plaintiff has threatened prosecutions and actually brought suits against defendants dealers and otherwise harassed, threatened, intimidated, coerced, bull-dozed and brow beaten them in an attempt to monopolize said words and to prevent their use by the defendants, and hence that plaintiff has come into Court with unclean hands and is itself guilty of vastly more pernicious unfair competition in this respect against defendants, than it even accuses defendants of.

XXII.

That the said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from using or employing, or authorizing

the use or employment of labels, designs or devices like those of the plaintiff or the labels or designs and devices used by the defendants and referred to in the bill of plaintiff in this cause: [287]

1. Because there was no evidence to sustain the finding the defendants have ever used any labels, designs or devices like those of the plaintiff, with the possible exception of a short time when two of the defendants adopted and used a label similar in shape and color to the label used by the plaintiff, the use of which label was voluntarily discontinued by said defendants many months before the filing of the bill in this cause.

2. Because it was established by the greater weight of the evidence that the labels, designs and devices used by the plaintiff are not peculiar to or distinctive of plaintiff's product, and do not serve to identify or distinguish it in the market, but are old in the art, common to the trade and in general use, except in so far as they bear thereon the words "Coca-Cola," and that the use of such labels, designs or devices by defendants, with the name "Coca-Cola" absent therefrom, could not amount to a misrepresentation as to the origin of their product or result in a deception of purchasers.

XXIII.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from using in connection with the sale or shipment of any product not the plaintiff's, in barrels or receptacles colored in imitation of plaintiff's barrels or receptacles:

1. Because it was established by the greater weight of the evidence that the color of defendants barrels is produced by a paint made from red clay, which is the cheapest and most serviceable paint on the market for the painting of barrels, and that said paint produces only one color, to wit, the color of the clay of which it is made, and hence that the use of said color does not rest along upon arbitrary selection, but results from considerations of economy, convenience and serviceability;

2. Because it was established by the greater weight of the evidence that the color of plaintiff's barrels is not now, or never was distinctive, and does not now or never did identify or distinguish [288] plaintiff's barrels in the market, but that said color for syrup barrels is now, and has been for many years, old in the art, common to the trade, and in general use by practically all the manufacturers and dealers in like products, and, indeed by the manufacturers of and dealers in all kinds of syrups, and that the use of barrels of such color could not possibly amount to a misrepresentation as to the origin of defendants' products, or result in a deception of purchasers.

3. Because it was established by the greater weight of the evidence that defendants and their predecessors used barrels of said same color prior to, and at the time, plaintiff's predecessors began to use barrels of said color, and have continuously done so ever since, in connection with the sale and shipment of products similar to the plaintiffs;

4. Because it was established by the greater

weight of the evidence that dealers could not possibly be deceived as to the origin of the product simply because of the color of the barrels in which it was shipped to them, and that the consumers do not see the barrels at the time of purchasing the product, and hence that the color of the barrels could not possibly cause them to be deceived as to the origin of the product.

5. Because it was established by the greater weight of the evidence that defendants, and their predecessors in title, have used barrels and receptacles of substantially the same color as plaintiff's said barrels, in connection with the sale and shipment of syrups similar to plaintiff's, for more than a quarter of a century, and that numerous other competitors of plaintiff have used barrels of the same color for many years with the knowledge and acquiescence of the plaintiff, and that, therefore, plaintiff is now estopped to complain of defendants' use of barrels of said color.

6. Because said injunction is broader than is warranted by the pleading and the proof in that it enjoins defendant from using not only barrels resembling plaintiff's in color, but also any receptacles of any kind resembling in color the corresponding receptacles of the plaintiff, without regard to whether or not the color of said receptacles is distinctive or is in general use, old in art and common to the trade.
[289]

7. Because it was established by the greater weight of the evidence that the color of none of plaintiff's receptacles is distinctive, but that their colors

are all of old in the art, common to the trade, and in general use, so that the use of receptacles of such color by defendants could not possibly misrepresent the origin of their product or result in the deception of purchasers.

XXIV.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from stating or representing that their syrup made and sold by the defendants or any of them is made from the same formula as "Coca-Cola" syrup:

1. Because it was established by the greater weight of the evidence that defendants have not stated or represented that their syrup is made according to the same formula as plaintiff's syrup is now made.

2. Because it was established by the greater weight of the evidence that defendants' statements or representations to the effect that their syrup is made substantially according to the original "Coca-Cola" formula,—that is the formula by which Dr. Pemberton, the inventor of the drink, made it—were the truth.

XXV.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from stating or representing that they or any of them, know or may rightfully use the "Coca-Cola" formula:

1. Because it was established by the greater weight of the evidence that defendants' predecessor

in title, J. C. Mayfield, did know the "Coca-Cola" formula, because he purchased a part interest in it from the inventor of the drink, Dr. Pemberton, in 1888, and was taught how to make said product by the said Dr. Pemberton, and that he did in fact make and sell original, identical "Coca-Cola" syrup, and that he imparted his knowledge of said formula to the defendant, The Koke Company of America.

2. Because the defendants have the right under the law to use and employ the "Coca-Cola" formula.

3. Because it was established by the greater weight of the evidence [290] the defendants' predecessors in title, J. C. Mayfield, A. O. Murphy, E. H. Bloodworth and Dr. Pemberton, owned and conducted the coca-cola business, goodwill, and the formula, and that they and their successors have continuously ever since manufactured said product according to said formula.

4. Because it was established and admitted that plaintiff's formula is not patented, and it was established by the greater weight of the evidence that same is not a secret but that it is known and rightfully used by hundreds of plaintiff's competitors.

XXVI.

The said District Court erred in perpetually enjoining and restraining defendants, their officers, agents, etc., from coloring any product in imitation of or like the coloring of "Coca-Cola" without clearly indicating in connection with the sale thereof that the product is manufactured by the defendants and not by the plaintiff:

1. Because it was established by the greater

weight of the evidence that the color of plaintiff's product is not peculiar to or distinctive of plaintiff's said product, and does not serve to identify or distinguish it in the market, but that said color was before and at the time plaintiff adopted it, old in the are, common to the trade and universally used for coloring innumerable similar beverages and for coloring innumerable other varieties of soft drinks, and that hence the color of defendants' products could not possibly misrepresent its origin or result in the deception of purchasers.

2. Because it was established by the greater weight of the evidence that defendants' predecessors in title, manufactured and sold a beverage of precisely the same color as plaintiff's product, prior to the time when plaintiff's predecessors began to manufacture and sell plaintiff's product, and have continuously since then manufactured and sold said product and other similar products having identically the same color.

3. Because said injunction requires the defendants to extol plaintiff's goods in an attempt to sell their own. [291]

4. Because it was established by the greater weight of the evidence that plaintiff has silently acquiesced in the manufacture and sale of almost innumerable similar products having the same color as its product, for more than a quarter of a century, and in the manufacture and sale by the defendants of similar products, having the same color for more than a quarter of a century, and hence that plaintiff is now estopped and barred by its laches and acquiescence

from complaining of defendants' use of said color.

5. Because it was established by the greater weight of the evidence that plaintiff made no pretensions to the possession of any exclusive right to use said color, or of any right to enjoin others from giving to their products a color identical with, or like, the color of plaintiff's said product, until comparatively recently, and that the recent effort of plaintiff to monopolize said color is one of the steps in its scheme to monopolize the cola drink industry.

6. Because the color of defendants' product is not an arbitrary, fanciful feature of dress merely, but is in fact a fundamental, structural feature of the article, and a physical requirement thereof essential to commercial success.

XXVII.

The said District Court erred in perpetually enjoining and restraining the defendants from doing any act or thing, or using any names or nicknames, devices, artifices or contrivances which may be calculated to represent that any product, not of the plaintiff's production, is the genuine Coca-Cola of the plaintiff.

1. Because it was shown by the greater weight of the evidence that defendants have not been guilty of any such conduct.

2. Because said injunction is too broad in that it is not specific, but is a general sweeping command to desist from any and all unfair competition without pointing out specifically what is prohibited.

XXVIII.

The said District Court erred in awarding plaintiff

a reference for damages and profits: [292]

1. Because there was no evidence to sustain the finding that plaintiff has suffered any actionable damage at the hands of the defendants.

2. Because plaintiff has silently and knowingly acquiesced in defendants' conduct for so long that it is now estopped and barred by its said acquiescence and laches from recovering damages or profits from the defendants.

3. Because this was a suit for unfair competition pure and simple and in such cases it is not proper to award profits.

XXIX.

The said District Court erred in finding, holding, adjudging and decreeing that the defendant, The Koke Company of America, and its predecessor, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909; because it was established by the greater weight of the evidence that the said J. C. Mayfield and associates, did adopt and first used said mark on or about the 14th day of April, 1888, and that they and their successors have continuously used the same ever since.

XXX.

The said District Court erred in finding, holding, adjudging and decreeing that defendants and their predecessors have no interest in or claim to the trademark "Coca-Cola," the Coca-Cola business or formula, and that the claim of the defendants, and their predecessors' claim, of interest in the Coca-Cola business, in the trademark Coca-Cola, and knowledge of the Coca-Cola formula are without foundation.

1. Because neither the defendants nor their predecessors have claimed any interest in the trademark "Coca-Cola" or the Coca-Cola business in recent years, their claim merely being that they formerly owned an interest therein, which is true.

2. Because it was established by the greater weight of the evidence that the defendants' predecessors' claim of interest in the Coca-Cola business, trademark and formula was well founded. [293]

XXXI.

The said District Court erred in finding, holding, adjudging and decreeing that the words "Koke" and "Dope" were adopted and used by the defendants and their predecessors with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company; because said finding was against the greater weight of the evidence.

XXXII.

The said District Court erred in finding, holding, adjudging and decreeing that the defendants' salesmen were instructed to sell and did sell defendants' product under the names "Koke" and "Dope" as and for Coca-Cola, because said finding was against the greater weight of the evidence.

XXXIII.

That said District Court erred in finding, holding, adjudging and decreeing generally that the defendants and each of them have infringed the plaintiff's trademark and have been guilty of unfair competition with the plaintiff; because said finding was against the greater weight of the evidence.

XXXIV.

The said District Court erred in failing to dismiss the plaintiff's bill and to adjudge all the costs of the cause against the plaintiff; because plaintiff has come into Court with unclean hands and has been guilty of such inequitable conduct on its part as deprives it of the right to the relief sought in its bill of complaint in this cause, as more specifically set forth in assignments I to XI inclusive, *supra*.

XXXV.

The said District Court erred in failing to find, hold, adjudge and decree that this suit was not brought in good faith to address any real or fancied grievance but that it was brought simply and solely in the attempt to acquire a monopoly by bankrupting the defendants with the enormous expense necessary to adequately defend themselves against this suit, and by defrauding the Court with perjured and corrupted testimony into rendering a decision and entering a decree which will operate [294] to give plaintiff a monopoly by establishing the precedent that no one but plaintiff may lawfully manufacture and sell the kind of drink that plaintiff makes and sells.

XXXVI.

The said District Court erred in rendering any judgment against the defendants, because of plaintiff's unclean hands and inequitable conduct as more specifically set forth in assignments I to XI inclusive, *supra*.

RICHARD E. SLOAN,
A. B. LITTLETON,

Attorneys for Defendants. [295]

[Endorsed]: In Equity No. ——. In the United States District Court for the District of Arizona. The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Assignment of Errors. Filed Oct. 16, 1916, at ——. M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [296]

In the United States District Court for the District of Arizona.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE SOUTHERN KOKE COMPANY, LTD., THE KOKE COMPANY OF TEXAS, THE KOKE COMPANY OF OKLAHOMA, and THE KOKE COMPANY OF ARKANSAS, Defendants.

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS:

That we, The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, as principals, and the Southern Surety Company as surety, are held and firmly bound unto the Coca-Cola Company, a corporation, in the full and just sum of One Thousand

(\$1,000) Dollars to be paid to the said Coca-Cola Company, its heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals and dated this day of October, in the year of our Lord one thousand nine hundred and sixteen.

WHEREAS, lately at the March, 1915, term of the United States District Court for the District of Arizona, in a suit depending in said Court between The Coca-Cola Company [297] a corporation, plaintiff, and The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, defendants, a decree was rendered against the said defendants and the said defendants have obtained an allowance of appeal from the said decree of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, shall prosecute their said appeal to effect and answer all costs if they fail to make good their said plea, then the above obliga-

tion to be void; else to remain in full force and virtue.

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY,
LTD.,

THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA,
and

THE KOKE COMPANY OF ARKANSAS,
By RICHARD E. SLOAN,

Attorney in Fact.

THE SOUTHERN SURETY COMPANY.

By V. C. COOK,

Attorney in Fact.

The foregoing bond is approved this 25 day of October, 1916.

WM. H. SAWTELLE,

Judge.

[Endorsements]: In Equity No. E-21. In the United States District Court for the District of Arizona. The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Arkansas, Defendants. Appeal Bond. Filed Oct. 25, 1916 at — M. Mose Drachman, Clerk. By R. E. L. Webb, Deputy.

*In the United States District Court for the District
of Arizona.*

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,

Defendants.

Injunction Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, The Koke Company of America, The
Southern Koke Company, Ltd., The Koke Company
of Texas, The Koke Company of Oklahoma, and The
Koke Company of Arkansas, as principals, and The
Southern Surety Company as surety, are held and
firmly bound unto The Coca-Cola Company, a Cor-
poration, in the full and just sum of five thousand
dollars (\$5,000), to be paid to the said Coca-Cola
Company, its heirs, executors, administrators, suc-
cessors or assigns, to which payment well and truly
to be made we bind ourselves, our heirs, executors
and administrators, successors or assigns, jointly
and severally by these presents. Sealed with our
seals and dated this — day of October in the year
of our Lord one thousand nine hundred sixteen.

Wherefore, lately at the March, 1915, term of the
United States District Court for the District of Ari-

zona in a suit depending in said court between The Coca-Cola Company, a corporation, plaintiff, and The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, defendants, a decree was rendered against the said defendants, and the said defendants have obtained an allowance of appeal from the said [299] decree of the said court to reverse the said decree in the aforesaid suit and a citation directed to the said plaintiff citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit Court at the City of San Francisco thirty days from and after the date of said citation;

Whereas the above-entitled court by its order has suspended the injunction granted in said decree for the period of thirty days from its date and during the pendency of said appeal upon the defendants giving bond as required by Equity Rule 74, in the sum of five thousand dollars (\$5,000);

Now, therefore, the condition of the above obligation is such that if the said The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas shall prosecute their said appeal to effect and answer all damages the said The Coca-Cola Company may suffer by reason of the suspension of said injunctive order during the pendency of said appeal, then the

said obligation to be void, else to remain in full force and virtue.

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY,
LTD.,

THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA,
THE KOKE COMPANY OF ARKANSAS,

By RICHARD E. SLOAN,
Attorney in Fact.

THE SOUTHERN SURETY COMPANY,
By V. C. COOK,
Attorney in Fact.

The foregoing bond is approved this 25th day of October, 1916.

WM. H. SAWTELLE,
Judge.

Filed October 25, 1916. Mose Drachman, Clerk.
By R. E. L. Webb, Deputy. [300]

*In the United States District Court for the District
of Arizona.*

E.-21 (PHX.).

THE COCA-COLA COMPANY,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Defendants.

Order Extending Time for Filing Transcript.

Good cause appearing therefor, it is hereby ordered that the time within which the defendants in the above-entitled cause are required to prepare and file with the Circuit Court of Appeals, a transcript on appeal be extended an additional sixty days from the 16th day of November, 1916.

WM. H. SAWTELLE,

Judge.

Original Copy mailed to Circuit Court of Appeals,
Nov. 16, 1916.

R. E. L. WEBB,

Deputy Clerk. [301]

[Endorsements]: In the United States District Court for the District of Arizona. The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Oklahoma, and The Koke Company of Arkansas, Defendants. Order Extending Time for Filing Transcript. Filed Nov. 16, 1916. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [302]

*In the District Court of the United States for the
District of Arizona.*

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF ARKANSAS, THE
KOKE COMPANY OF OKLAHOMA,
Appellants,

vs.

THE COCA-COLA COMPANY,
Appellee.

**Order Extending Time to March 15, 1917, to File
Transcript on Appeal.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the appellants have until the 15th day of March, 1917, within which to perfect its appeal and to file or cause to be filed the transcript on appeal in the Circuit Court of Appeals for the Ninth Circuit.

WM. H. SAWTELLE,
Judge of the District Court of the United States for
the District of Arizona. [303]

[Endorsements]: In the District Court of the United States for the District of Arizona. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Arkansas, The Koke Company of Oklahoma, Appellants, vs. The Coca-Cola Company, Appellee. Order. Filed Jan. 8, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [304]

*In the District Court of the United States for the
District of Arizona.*

No. E-21. (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Order Extending Time to March 25, 1917, to File
Transcript on Appeal.**

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended for ten days from the date on which the order heretofore entered herein expires.

Dated at Prescott this 13th day of March, 1917.

WM. H. SAWTELLE,

Judge. [305].

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.-21 (Phx.) Order Extending Time for Filing Record on Appeal. The Coca-Cola Co., Ptf., vs. The Koke Company of America et al., Defts. Filed March 13, 1917. Mose Drachman, Clerk. [306]

*In the District Court of the United States for the
District of Arizona.*

No. E.-21 (PHOENIX).

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,

Defendants.

**Order Extending Time to and Including April 10,
1917, to File Transcript on Appeal.**

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended to and including the tenth day of April, 1917.

Dated at Phoenix this 24th day of March, 1917.

WM. H. SAWTELLE,

Judge. [307]

[Endorsements]: In the District Court of the United States for the District of Arizona. The Coca-Cola Company, Plaintiff, vs. The Koke Company of America et al., Defendants. Order. Filed Mch. 24, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [308]

*In the District Court of the United States for the
District of Arizona.*

No. E.-21 (PHOENIX).

THE COCA-COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Order Extending Time to and Including April 15,
1917, to File Transcript on Appeal.**

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended to and including April 15, 1917.

Dated at Phoenix, Ariz., this 2d day of April, 1917.

WM. H. SAWTELLE,

Judge of the District Court of the United States for
the District of Arizona. [309]

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.-21 (Phoenix). The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America et al., Defendants. Order. Dated April 2, 1917. Filed April 2, 1917. Mose Drachman. [310]

*In the District Court of the United States for the
District of Arizona.*

No. E.-21 (PHOENIX).

THE COCA-COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Order Extending Time to and Including April 15,
1917, to File Transcript on Appeal.**

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended to and including April 15, 1917.

Dated at Phoenix, Ariz., this 2d day of April, 1917.

WM. H. SAWTELLE,

Judge of the District Court of the United States for
the District of Arizona. [311]

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.-21 (Phoenix). The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America et al., Defendants. Order. Dated April 2, 1917. Filed April 2, 1917. Mose Drachman. [312]

*In the District Court of the United States, for the
District of Arizona.*

No. E.-21 (PHOENIX).

THE COCA-COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Order Dated April 14, 1917, Extending Time Sixty
Days to File Transcript on Appeal.**

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended for sixty days from the date on which the order heretofore entered herein expires.

Dated at Phoenix, this 14th day of April, 1917.

WM. H. SAWTELLE,

Judge of the District Court of the United States for
the District of Arizona. [313]

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.-21 (Phoenix). The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America et al., Defendants. Order. Dated April 14, 1917. Filed April 14th, 1917. Mose Drachman, Clerk. [314]

*In the District Court of the United States, for the
District of Arizona.*

No. E.-21 (PHOENIX).

THE COCA-COLA COMPANY, a Corporation,
Plaintiff,

vs.

THE KOKE COMPANY OF AMERICA et al.,
Defendants.

**Order Dated April 14, 1917, Extending Time Sixty
Days to File Transcript on Appeal.**

For good cause, IT IS ORDERED that the time within which the defendants shall file their record on appeal in the Circuit Court of Appeals be and the same is hereby extended for sixty days from the date on which the order heretofore entered herein expires.

Dated at Phoenix, this 14th day of April, 1917.

WM. H. SAWTELLE,

Judge of the District Court of the United States for
the District of Arizona. [315]

[Endorsements]: In the District Court of the United States for the District of Arizona. No. E.-21 (Phoenix). The Coca-Cola Company, a Corporation, Plaintiff, vs. The Koke Company of America, et al., Defendants. Order. Dated April 14, 1917. Filed April 14th, 1917. Mose Drachman, Clerk. [316]

*In the District Court of the United States, for the
District of Arizona.*

No. E.-21 (PHOENIX)—IN EQUITY.

THE COCA-COLA COMPANY,

vs.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF ARKANSAS, THE
KOKE COMPANY OF OKLAHOMA.

Praeceptum for Transcript of Record.

To the Clerk of the United States District Court for
the District of Arizona:

Sir: You will please prepare a transcript of the
record in the above-entitled cause to be filed in the
office of the Clerk of the United States Circuit Court
of Appeals for the Ninth Judicial Circuit under the
appeal to said court in said cause, and include in
said transcript the following proceedings, pleadings,
papers, records, files and exhibits, to wit:

The judgment-roll including original bill of com-
plaint.

The motion to amend the bill of complaint.

The amendments thereto and the affidavits filed
with respect thereto.

Transcript of minute entries.

Statement of the evidence.

Orders extending time for completing the record
and filing transcript.

Petition on appeal and order granting supersedeas.

Assignment of errors.

Bond on appeal.

Supersedeas bond.

Citation on appeal. [317]

Praecipe for transcript.

Plaintiff's exhibits.

Defendants' Exhibit 1 to 279, inclusive, and from "A" to "F," and from rebuttal 1 to rebuttal 10-2, all inclusive.

And all other records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said appeal.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

RICHARD E. SLOAN,
A. B. LITTLETON,
Attorneys for Defendants.

[Endorsements]: In the District Court of the United States in and for the District of Arizona. The Coca-Cola Company vs. The Koke Company of America, The Southern Koke Company, Ltd., The Koke Company of Texas, The Koke Company of Arkansas, The Koke Company of Oklahoma. No. E.-21 (Phoenix). In Equity. Praecipe for Transcript of Record. Richard E. Sloan, Augustine B. Littleton, of Counsel for Defendants. Service acknowledged this 27th day of March, 1917. J. E.

Morrison, Solicitor for Plaintiff. Filed March 27, 1917. Mose Drachman, Clerk. By R. E. L. Webb, Deputy. [318]

Testimony in Chief of the Appellee, The Coca-Cola Company.

(The following depositions were taken in Atlanta, Georgia, July 27th to 31st, inclusive, 1914.)

Deposition of Samuel C. Dobbs, for Plaintiff.

SAMUEL C. DOBBS.

Direct Examination by Mr. HIRSCH.

I am forty-five years of age, reside in Atlanta, Georgia, and have resided there since 1886. In 1886 I was a druggist with Asa G. Candler & Company. I was in the laboratory, and traveling salesman, and in the shipping department. I do not know how long they were in business. I was with them from 1886 until they went out of business in 1892; then I went away for a short while on account of my health; and then took up work with the Coca-Cola Company. The Coca-Cola Company is a corporation, having been incorporated in February, 1892. Exhibit #1 is a certified copy of the charter of incorporation. While I was connected with the firm of Asa G. Candler & Company I knew Dr. Pemberton very well—I did not know him in the capacity of a business associate, but I knew him when I saw him, occasionally went to his place on Marietta Street, knew him when he came there to the place, sometimes waited on him.

(Deposition of Samuel C. Dobbs.)

The first "Coca-Cola" I ever saw, I think, was in the Spring of 1887. I was then in the shipping department of Asa G. Candler & Company, and we had an order to ship a gallon of "Coca-Cola," my recollection is, to Dr. Sellman at Douglasville—it is a little long to remember accurately, but I remember the package because it was the first I had ever seen. My recollection was that was in the Spring, along in May of 1887, because I know I was looking after the shipping at that time and it was brought in there to be shipped to some customer. It came from what was at that time 107 Marietta Street. I do not recollect that I went to 107 Marietta Street that day to get the order, I just remember the peculiar package because it was the first time I had ever seen it. In my visits to what was then 107 Marietta Street I saw Dr. Pemberton and Mr. F. M. Robinson and Charley Pemberton and a man named Walker. I do not know whether it was just at that time or not, you know, Mr. Hirsch, twenty-five years back it is difficult to determine [319] accurately just who you saw around the place. I remember the place well and remember several times seeing Charley Pemberton around there.

"Q. 19. What was the color of that drink you got in response to the order for 'Coca-Cola'?"

"A. The same color it is now—brown, port wine color, more properly speaking a caramel color."

Around the Spring of 1887 I occasionally got an order for "Coca-Cola" and filled it. I think generally the order was turned over to us by Dr. Pember-

(Deposition of Samuel C. Dobbs.)

ton—that is a habit, you know, of manufacturers and wholesalers—and I also got some tickets, Charley Pemberton brought them in there; a ticket about the size of a small envelope, good for two glasses, and I drank it at the soda-fountain then run next door to us by a bakery. I do not know that I saw any advertising of “Coca-Cola” that year. In 1888 I saw quite a little bit of it. In 1889 there was more, and in 1890 there was still more because at that time it was being run from our drug-store. In 1891 there was quite a little bit more—quite a good deal in 1891. The conspicuous thing about that advertising from the period of 1887 up to 1891 was the peculiar script, the name “Coca-Cola.”

Commencing in 1892 I traveled for the Coca-Cola Company, kept its books, and sometimes worked out in the factory—sort of “jack-of-all-trades” at that time, because there wasn’t but three or four of us there.

The sales of “Coca-Cola” from 1886 to 1892 are as follows: In 1886, 25 gallons; in 1887, 1,049 gallons; in 1888, 1,933 gallons; in 1889, 2,171 gallons; in 1890, 8,885 gallons; in 1891, 19,831 gallons; since 1892 the records of the Coca-Cola Company have been made mostly under my own direction and often with my own hand, and are as follows: In 1892, 35,360 gallons; in 1893, 48,554 gallons; in 1894, 63,933 gallons; in 1895, 74,479 gallons; in 1896, 116,492 gallons; in 1897, 167,681 gallons; in 1898, 214,008 gallons; in 1899, 281,055 gallons; in 1900, 370,877 gallons; in 1901, 468,411 gallons; in 1902,

(Deposition of Samuel C. Dobbs.)

677,515 gallons; [320] in 1903, 881,423 gallons; in 1904, 1,133,787 gallons; in 1905, 1,548,888 gallons; in 1906, 2,107,661 gallons; in 1907, 2,558,782 gallons; in 1908, 2,877,732 gallons; in 1909, 3,486,526 gallons; in 1910, 4,190,149 gallons; in 1911, 4,815,677 gallons; in 1912, 5,504,956 gallons; and, in 1913, 6,767,822 gallons.

At present I am Vice-president of the Coca-Cola Company in charge of advertising and sales. The history of the advertising of "Coca-Cola" since 1892 is as follows: In 1892 the Coca-Cola Company spent for advertising \$11,401.78; in 1893 we spent \$12,395.-12; in 1894, \$14,538.14; in 1895, \$17,744.22; in 1896, \$23,117.58; in 1897, \$52,405.18; in 1898, \$43,857.62; in 1899, \$48,564.83; in 1900, \$84,507.97; in 1901, \$100,276.01; in 1902, \$149,628.79; in 1903, \$200,941.-40; in 1904, \$280,985.12; in 1905, \$356,552.07; in 1906, \$486,553.47; in 1907, \$550,775.12; in 1908, \$624,077.-70; in 1909, \$675,048.59; in 1910, \$853,329.13; in 1911, \$978,329.30; in 1912, \$1,182,257.29; and, in 1913, \$1,186,210.39.

In all that advertising I have mentioned the predominant feature has been the "Coca-Cola" trade-mark, appearing in red wherever we could. The name "Coca-Cola" was always the dominant central feature of the copy whether newspapers, magazines, bill-boards, posters or any other way, painted walls—in that peculiar script trade-mark. Ever since I have known "Coca-Cola" it has, when attached to the goods, or in advertising, been in the peculiar script to which I refer. The nature of this adver-

(Deposition of Samuel C. Dobbs.)

tising, starting back in 1892 on up to date, has been practically every legitimate form of advertising. Up to 1906 it was pre-eminently what is known as display advertising—that is, painted bulletins on boards, fences, painted walls, painted signs on windows over stores; also poster advertising, which is large lithograph posters pasted on boards, oil cloth signs of various dimensions, metal signs of various sizes and shapes. Last year the order for metal signs amounted to about four hundred tons of metal, and about 5,000,000 pieces, on every one of which appeared the words “Coca-Cola” in red—or red background—in the script form. Since 1904 we have been using to a very considerable extent magazines in [321] which it appears both in black and white and in colors. If in colors, the “Coca-Cola” script is always in red. The inside pages, we cannot generally get the colors; that is then printed in black and white. Since 1906 we have been using very largely newspaper advertising. Previous to that time we used it to some extent, but since 1906 we have been spending exceeding a quarter of a million dollars a year in newspapers. That generally appears in black and white, and always in the script, and, occasionally, we use back pages in colors, that is, red, black and white, particularly in the newspapers of large circulation like the Chicago “Tribune” and “Examiner”—papers of that type. This advertising has been going on all over the United States, in Cuba, Canada and in the Hawaiian Islands. Of course, newspapers, and magazines

(Deposition of Samuel C. Dobbs.)

particularly, circulate all over the world, we cannot control that circulation, but it has been concentrated to a very considerable extent in the United States and Canada. In regard to painting wall spaces in different cities, the rule we give out is this: We have our color combination, which is a red background—what is known amongst painters and paint manufacturers as “Coca-Cola red.” We have established a peculiar color of red that a great many of the paint manufacturers make and brand as “Coca-Cola Red.” These signs are painted with the red background and with white letters, in the “Coca-Cola script always, outlined with black with a green border. I do not know of a town in the United States hardly of 2,500 or over that has not got “Coca-Cola” signs in it. We have got now standing under contract exceeding five million square feet of walls. That does not have reference to iron signs—or tacking signs, we call them—and we have got about fifty thousand lineal feet—lineal feet means the length of the signs—of bulletin boards, in addition. We have had from five to eight crews of painters working during the past three or four years painting signs on windows, under windows, and what we call “privilege signs.” We differentiate a “privilege sign” from a “contract sign.” In the latter, we contract with certain paint concerns like the Thomas Cusak, of Chicago, R. C. Maxwell Company of Trenton, and many [322] other concerns of that sort, to paint for us certain states, with an allotment of so many square feet in a state or section.

(Deposition of Samuel C. Dobbs.)

for which we pay a specific price per square foot—that is what we know as “Contract work.” This other work is small work where our crews, as here in Atlanta, go to a retail druggist or confectioner or soda-fountain man, who has a small space—it may be only one hundred square feet—but it is right in the heart of things—the contract painters cannot get that because the man won’t let them have it—and for the privilege of painting our sign on that wall we paint for this dealer his name and business, and we are doing that all the time all over the United States. That runs into an enormous amount of footage, but we only keep a record of the signs. In addition to the name of the dealer there appears the regular script, “Coca-Cola,” and, usually, “Delicious and Refreshing.” We—that is, the Coca-Cola Company—have from ninety to one hundred men working constantly, and they call on the trade, and part of their duties is to decorate the fountains—put up signs, very frequently decorate a mirror with a permanent sign to stay there for several months—the purpose of each is to always get up the regulation “Coca-Cola” sign, with the script, invariably. I have before me here proofs of the 1914 newspaper and magazine copy. Exhibit #2 appears largely in the back pages of magazines where they can print it in colors. As you will notice, the word “Coca-Cola” appears there in large red letters—the “Coca-Cola” trademark. This has appeared in magazines with large circulation all over the country. Exhibit #3 is a piece of inside magazine copy—of black and

(Deposition of Samuel C. Dobbs.)

white copy. This was designed largely for the women's publication of large circulation. This piece alone had a circulation this year of over a hundred million copies. Exhibit #4, is similar in design, different in size, to fit what is known as the standard magazines, and also run as quarter pages in the larger publications. [323] In exhibit #5 you will notice the "Coca-Cola" trademark appears in red, which was used in the back pages, and second or third inside covers, of standard publications. Exhibit #6 is similar in design, and the name "Coca-Cola" appears in red. This was used on the back pages of such publications as "Colliers," "Leslies," etc. Exhibit #7 is similar in design, merely altered to meet the demand of different size media. Exhibit #8, magazine copy in colors, is a drawing by Hamilton King of New York for the early Spring campaign. This appeared in most of the leading publications of this country in May. Exhibit #9 and #10 followed the publication of Exhibit #8. The copy is in colors, the dominant note of red, used in back pages of various magazines published in the United States and Canada. This piece of copy had a circulation of more than a hundred million. Exhibit #11 represents to a very large extent the newspaper campaign for 1914, this copy appearing in newspapers in Canada, the United States and Cuba, representing an expenditure exceeding \$300,000.00. In addition to this copy, submitted in Exhibit #11, was a number of back pages of newspapers in colors similar to the magazine exhibits. Exhibit #12 rep-

(Deposition of Samuel C. Dobbs.)

resents copy for special publications, trade papers, magazines of small circulation and of irregular shape. Exhibit #13 represents copy gotten up especially for farm papers and religious papers. We have inserted this copy in most of the religious, and the best of all the farm, papers in this country, representing several million circulation in the suburban communities. Exhibit #14 represents what we call our "Four-Head-Cut-Out." That is used in window displays to fill in at the bottom, and 200,000 of these were used during the past twelve months. Exhibit #15 represents to a limited extent street car advertising. Since 1896 "Coca-Cola" advertising has appeared regularly in most of the street cars in the United States and Canada, as shown in these cards, always the script "Coca-Cola," and predominantly in red—either red background with the script white letters or the script in red letters. Exhibit #16 is a lithographed metal sign, "Coca-Cola," script in [324] white letter outline, green border, red background. Of this sign, in various dimensions, running from 6 to 10 inches to 5 feet by 8 feet, we use annually exceeding five million pieces. Exhibit #17 is what is known as an "enamelled metal sign." These signs are permanent, being enamelled and impervious to the weather, only used in choice locations, and of these we use, in two sizes—12 inches by 36 inches and 18 inches by 45 inches—about 10,000 each annually. Some of these signs are now up and were placed by me personally in 1893. Exhibit #18 represents what we call a "festoon de-

(Deposition of Samuel C. Dobbs.)

sign." This is used in the decoration of soda-fountains, and of these, in various dimensions, we use 60,000 annually. Exhibit #19 is what we call a "Lithograph show card," lithographed in sixteen colors, framed, and is hung in confectionery stores, drug-stores of the better class, as a permanent decorative sign. Exhibit #20 represents special signs gotten out for the use of "Coca-Cola" bottlers, showing the regulation script "Coca-Cola," with a facsimile of "Coca-Cola" in bottles at each end 12 inches wide, 36 inches long, and of these we use 250,000 annually, tacking on stands and stores and fences. Exhibit #21 is what is known as a "cut-out" used for window display and store display, mounted on heavy cardboard, and of these, in various designs, the Coca-Cola Company uses annually about 50,000. Exhibit #22 is known as the "Seashore Cut-Out" and it's uses are similar to those described for Exhibit #21, and of these the Coca-Cola Company used in 1914, 35,000. Exhibit #23 is a "four-head-festoon design" used for decorating soda-fountains, and, occasionally, in window displays. Of these the Coca-Cola Company used, in 1913, 60,000. Exhibit #24 is a lithographed metal imperial display sign. This is a permanent sign displayed in drug-stores, confectionery stores, and dealers in "Coca-Cola." 10,000 were used in 1914. Exhibit #25, similar to Exhibit #24, but smaller in design, is used in small stores and stands, containing reproduction of bottles. 20,000 were used previous to 1914. Exhibit #26 is a metal sign used for tacking

(Deposition of Samuel C. Dobbs.)

under windows and over gratings. Of these we use 50,000 annually. Exhibit #27 is a "fibre" [325] sign, used very largely in temporary stands and for tacking on walls, fences, etc., and of these we have used exceeding 200,000. Exhibit #28 is an exhibit of three trays. Of these we use two million annually for the purpose of serving "Coca-Cola" at soda-fountains throughout the United States, and Canada. The "Coca-Cola" trademark appears in red, in the usual script design, in all of these. We have been using these trays in various designs since 1896. Exhibit #29 represents a window trim showing interior of a store, customers entering and being served; at the top of the window appears the usual trademark script in red, 42 inches long and 18 inches high. Exhibit #30 is a window trim of different design used for similar purposes as described in exhibit #29. Of these we use 50,000 a year. Exhibit #31, five-head window display showing in poster effect five girls' heads, facsimile of "Coca-Cola" glass, showing script trademark. These the Coca-Cola Company uses in quantities of 200,000 to 250,000 a year for making window displays and mirror decorations on soda-fountains. These we send in large quantities to the trade on request and they make their own displays. Exhibit #32 is a Japanese fan for general distribution, of which we have been distributing a million annually since 1906. Exhibits #33 and #34 are Christmas decorations representing typical Christmas wreaths and bells. We distribute annually 50,000 of these just

(Deposition of Samuel C. Dobbs.)

previous to the Christmas Holidays for fountain decorations. Exhibit #35 is the "Coca-Cola" song, about 50,000 copies of which have been distributed. Exhibit #36 is a transparent transfer sign for pasting on windows as illuminated display at night. Exhibit #37 is a folder, typical of a number the Coca-Cola Company mails out periodically to the trade. Exhibit #38 is of different design, but for similar purpose as exhibit #37. Exhibit #39 is a 1914 calendar. A million of these was distributed by the "Coca-Cola" Company through its representatives and by mail in 1914. We have been getting out a calendar annually for the past fifteen years. Exhibit #40 is a copy of the Coca-Cola Company's 1911 calendar. [326] Of these a half million were used. Exhibit #41 is a thermometer. Of these we distribute in various sizes 40,000 to 50,000 annually. Exhibit #42 is a match book given to cigar stores having soda-fountains, and drug-stores having cigar counters and soda-fountains, for free distribution to the trade, ten million annually being distributed. Exhibit #43 is a paper doily used for free distribution to customers serving drinks on the outside and lunch stands, approximately fifty million being distributed annually. Exhibit #44 is a celluloid fountain design used for display on soda-fountains. Exhibit #45 is a 24 sheet poster used for posting on billboards, showing trademarks ten feet by twenty feet. Advertising of this nature is used in various sizes from forty-two inches up to this size. Exhibit #46 is a poster design placed in the middle of

(Deposition of Samuel C. Dobbs.)

windows in connection with the window displays, and often used in the floor decoration displays. Exhibit #47 is an oil cloth sign used for tacking over store fronts, sides of walls and on refreshment stands generally. Exhibit #48 is a large calendar used for business houses and railroad offices. 10,000 of these are distributed annually. Exhibit #49, pencils used for gratuitous distribution to consumers, annual distribution one thousand gross. Exhibit #50 is a sample of what the Coca-Cola Company use as a trade proposition, mailing to the dispenser monthly. Exhibit #51 is a transparent sign used for posting on transoms and windows in localities where painters are unable to get. Exhibit #52 is another fountain sign used for display. This is an old design. We have used nothing like it since 1896. It would be impossible to say just when this was used—some time between 1892 and 1896. Exhibit #53 is a blotter for distribution to the consumers in office buildings, hotels, etc., annual distribution about twenty million. Exhibit #54 is a frame metal sign two feet wide and five feet long showing reproduction or facsimile, of the various wall and bulletin signs. These are used where the painters are unable to paint a wall, or the tenant or owner will not permit the wall to be painted, but will permit a sign to be tacked on for display, and of these 10,000 annually are distributed. Exhibit #55 is an oil cloth sign distributed to [327] bottle customers. Exhibit #56 is a transparent globe, mosaic art-glass work, placed in fountains of the higher class. Of

(Deposition of Samuel C. Dobbs.)

these the Coca-Cola Company has distributed more than five thousand in the past three years.

“Exhibit #57 is an art-glass sign similar to the transparent globe. Exhibit #58 is a baseball score card used in ball parks for free distribution through the concessionaire. Of these twenty-five million have been distributed. We have got only a limited amount of stuff here because we use it up and it is gone. Most of these here are of right recent date. Advertising of similar kind and character has been used by the Coca-Cola Company from 1892 up to date, differing in amount according to the amounts I have stipulated as having been spent for advertising—all right along the same line showing predominantly the color of red, and the trademark script, “Coca-Cola.”

The business of the Coca-Cola Company consists of the manufacture and sale of a beverage known as “Coca-Cola,” which it has been manufacturing and selling since its organization in 1892. Immediately preceding the Coca-Cola Company said beverage was manufactured by Walker-Candler & Company—Asa G. Candler, proprietor; and immediately preceding Asa G. Candler, proprietor, by Walker-Candler & Company; and previous to that, by Vanable, Lowndes & Company, I believe, or Vanable and Lowndes—it was George Lowndes and Willis Vanable, and, I believe, Mr. Walker. The Pemberton Chemical Company, is my recollection, preceded them. That product has always been sold under the name “Coca-Cola.” In my experience, and in my travels I have never known of any other product

(Deposition of Samuel C. Dobbs.)

known under the name "Coca-Cola."

Why, yes, I guess you could say I am familiar with the manufacture of "Coca-Cola"—I see it done, but I am not engaged in the manufacture. The color of Coca-Cola is a caramel color—or about the color of port wine, the nearest description—and it has been that color ever since I have known it. That color is produced by the addition of burnt sugar, which is used for coloring and for no other purpose whatever.

The syrup manufactured by the Coca-Cola Company is shipped in barrels, kegs and jugs, colored red, and said company has been doing [328] so ever since it started manufacturing it—identically the color they are now using. In the early days we bought red paint from here and there, and sometimes there was a slight variation in the color of red, and quite a number of years ago—something like ten or twelve years ago, I cannot determine definitely—we arranged with Samuel H. French & Company, of Philadelphia, to make for us—for the Coca-Cola Company and their various branches—this particular red which they know as "Coca-Cola red" and ship to us as such. Every barrel or keg we have gotten out is painted that color of red.

"Coca-Cola" is dispensed at soda-fountains in the proportion of one ounce of syrup to six ounces of carbonated water. It is generally kept in a jar inside of the soda-fountain, sometimes in a dispensing bottle on a counter, and in some instances in a special container. The Coca-Cola Company furnishes dispen-

(Deposition of Samuel C. Dobbs.)

sing bottles, a sample of one of which is shown by Exhibit #59.

I was sales manager for the Coca-Cola Company in 1904. From 1892 to 1896 I was traveling salesman for the company most of the time. From 1896 to 1904 I was in the office most of the time. Later, as sales manager, I travelled all over the United States every year—I covered the country every year as sales manager for the company. I frequent soda-fountains and call for “Coca-Cola.”

“86. From its appearance alone, Mr. Dobbs, how do you identify ‘Coca-Cola’?”

“A. By its color.

“Q. 87. If you were to see a whole lot of barrels in front of a soda stand painted red, what would be your conclusion from those barrels?”

“A. That they were ‘Coca-Cola’ barrels.”

In frequenting soda-fountains, the principal drink I hear called for is “Coca-Cola”—that’s the one big thing that’s called for; but I hear other names used, as nicknames for Coca-Cola, particularly here in the South, young men go in and call for a “dope” or a “koke.”

(Objected to by defendants because irrelevant and not warranted by the pleadings. Objection overruled. Exception.) [329]

My recollection is that it has been some ten or twelve years that I have heard these names used. The first time I heard it was here in 1901. The “Coca-Cola” was getting up quite a little sale at that time and a Dr. Scott, an old gentleman with nothing much

(Deposition of Samuel C. Dobbs.)

to do, noticed the demand for "Coca-Cola" at Venable's soda-fountain, and, from the fact that it had extract of coca leaves in it, apparently came to the conclusion that it had cocaine in it, and he wrote a card to the "Constitution" condemning its use and made the statement that it had cocaine in it, and from that arose, we assume, to the best of our knowledge, they got to calling it, as a joke, "Koke." Well, that was the first starting of it—I have even heard a boy going to a soda-fountain say, "Give me a shot in the arm" and I corrected the boy—over on Alabama and Broad Street, he called for a "shot in the arm" and the man served him "Coca-Cola." From my experience traveling around and hearing the use of the word "koke" and "dope," those words are, in my opinion, a nickname for "Coca-Cola" and exclusively refer to "Coca-Cola" invariably.

(Objected to by defendants because irrelevant and not warranted by the pleadings. Objection overruled. Exception.)

Exhibit #60 consists of several letters of endorsements and recommendations that came to Mr. Candler in the early years of the history of "Coca-Cola." I know of these people, some are addressed to Mr. A. G. Candler—some are addressed to the Coca-Cola Company. They are genuine letters and came to us—to him and to the Coca-Cola Company, in the due course of business and while I was connected with the business. I recognize the signatures of nearly every one of these and knew the individuals.

(Objection by defendants to the introduction of

(Deposition of Samuel C. Dobbs.)

Exhibit #60 and the testimony with respect thereto, because said documents filed as said Exhibit are unsworn, hearsay statements and are immaterial and irrelevant. Objection overruled. Exception.)

Exhibits #61 and #62 are labels used on "Coca-Cola" bottles. This particular form has been in use since 1907. [330] Previous to that time we used a label similar in shape but red in color. Exhibit #63 is a certification of the registration of trademark "Coca-Cola" January 31, 1892. Exhibit #64 shows the registration of the trademark October 31, 1905.

(Objection by defendants to the introduction of Exhibit #63 because not warranted by the pleadings. Overruled. Exception.)

"Coca-Cola" syrup is shipped to the bottling plants, which are about 600, scattered all over the United States, in barrels, and the bottling plants then bottle the syrup in these bottles—regulation "Coca-Cola" bottles—in the proportion of one ounce of "Coca-Cola" syrup to six ounces of carbonated water. This is done either by foot-power machines or automatic machines, under the authority and supervision of the Coca-Cola Company. We supply these bottlers with labels to put on the bottles. These bottles that are gotten up for the bottling of "Coca-Cola" are generally uniform. There is a "Coca-Cola" bottle—known as the "Coca-Cola" bottle, and published in the catalogue as "Coca-Cola's." These bottles are sold in almost every city in the United States, in Havana, Cuba, in Santiago, Cuba, and in twenty-five or more cities in Canada,

(Deposition of Samuel C. Dobbs.)

and it is bottled to some extent in foreign countries—proportionately, not to any large extent.

(Plaintiff here offered and tendered in evidence Exhibits Nos. 1 to 64, inclusive.)

It is agreed between counsel for plaintiff and defendants that the exhibits need not be attached to the depositions, but that same be identified by the commissioner and retained in the custody of counsel for the party tendering same, and that same be produced on the trial of these causes.)

Cross-examination by Mr. LITTLETON.

The “Coca-Cola” bottle is uniform in size and shape, but not always in color.

“XQ. Is it not a fact that ‘Coca-Cola’ is bottled under authority of the Coca-Cola Company in white bottles, amber bottles, dark-brown bottles, flint bottles and green-colored bottles? [331]

“A. Well, there is very little difference between what is termed by the trade as flint, green or white. to the average consumer they are all alike. Some of the bottling plants are using the amber bottles, but the proportion of them is comparatively small, and it is a thing we have objected to and are rapidly getting cleared out, but the dominant portion of ‘Coca-Cola’ is bottled in the regulation ‘Coca-Cola’ bottles.”

The regulation “Coca-Cola” bottle consists of a seven and a quarter ounce bottle, usually in a green—that is, a very light green, not a dark olive green, but a clear bottle with rather a distinctive shoulder shape. I have seen “Coca-Cola” bottled in eight-

(Deposition of Samuel C. Dobbs.)

ounce bottles, and in seven-ounce bottles, but I do not think I ever saw any in a six-ounce bottle. When it originally started the bottles held about eight ounces, but they have been gradually eliminated—we have been gradually eliminating that, we had lots to learn when we started the bottling business. For the past several years, the “Coca-Cola” bottles have all been tending towards one particular shape. Oh, there have been differences in shape in the past, yes, and it is sold now in bottles of different shapes to a very limited extent. Now and then a bottling plant will get some bottles—run short and get some bottles of different shape—but it is a very small part of the bottling business. I have been in most of the bottling plants all over the United States within the past eighteen months.

It was not in 1911, I think it was later—I do not recollect now—but there was a meeting of the “Coca-Cola” bottlers held here in Atlanta to adopt a uniform bottle. Just exactly what year the meeting was held I do not know, because that is a problem the bottlers have to contend with and more particularly dealing with the legal department than with me. The reason we wanted a uniform bottle was to protect ourselves against infringements. There would not have been any necessity to adopt a uniform bottle if they had all been uniform before that. [332] I have seen “Coca-Cola” put up at soda-fountains in dispensing bottles of a design and shape different from Exhibit #60. Sometimes soda-fountain men themselves buy an ornate bottle, and “Coca-

(Deposition of Samuel C. Dobbs.)

Cola" is exhibited to the public in those different shaped bottles occasionally, though very rarely—in fact, ninety per cent of the "Coca-Cola" that is dispensed is dispensed right from the jars. But in places where these dispensing bottles are used they are exhibited to the public—they are where the public can see them—but there is very few of them, because a man that gets this dispensing bottle keeps it, it don't cost him anything, as a rule. I have seen "Coca-Cola" dispensed out of a quart whiskey bottle. I know a dispenser in Richmond that keeps "Coca-Cola" in quart whiskey bottles and packed in ice. I have seen dispensing bottles with the words "Coca-Cola" on there, sometimes in black, sometimes in red, sometimes in block letters, sometimes with a sort of old English. I have seen probably a dozen in all my experience—very seldom.

I am not a chemist. The question as to why they use caramel in "Coca-Cola" is not a question of chemistry, it is a question of business practice. I know that they do not put the caramel in there for any other purpose than just to color the drink, because the Coca-Cola Company has been making it and I know that caramel has no effect upon the taste. We have experimented by making it without the caramel, too. It has been done here in our laboratory in my presence and under my observation. No, I did not say caramel has no taste at all; I say that caramel, in "Coca-Cola," has no effect upon the taste. Caramel in its concentrated form has a rather bitterish acrid taste.

(Deposition of Samuel C. Dobbs.)

I do not recollect ever having seen a piece of advertising consisting of a blue back-ground display poster with "Coca-Cola" printed on there in white letters and the rest of the legend in bright yellow letters. I certainly never bought anything of that kind for the Coca-Cola Company. I know the type of advertising that is used in the different localities, and if we have got some five hundred display advertisements of that sort in Chattanooga, Tennessee, I never bought it. [333] Yes, I do recollect that now. That was a poster, I think, probably gotten out by Mr. Rainwater for the bottlers, but it has the "Coca-Cola" trademark in the regular script. We sometimes occasionally get away—have in the past—less now than ever before—from it always appearing in red. In fact some years ago I concluded that red was such a dominant color that possibly it would be more attractive to have another color, but it did not amount to anything because I soon found my mistake and I came back to the combination of colors; but still, sometimes in getting out a poster the color combination is not such as that we can use that dominant red, but we always use the trademark "Coca-Cola" in the script. We sometimes advertise it in street-cars in white letters on green back ground, and sometimes in dark red letters, but always in the "Coca-Cola" script. The dominant color is red, seventy or eighty per cent of it. We have a calendar coming out for 1915 that we cannot use the red in except in the dress of the girl, but the rest is the "Coca-Cola" design.

(Deposition of Samuel C. Dobbs.)

I was with Candler & Company in 1887. At that time said company were jobbers of "Coca-Cola." We bought it from the Pemberton Chemical Company. I do not know whether or not at that time the Pemberton Chemical Company was a corporation, but they were doing business as the Pemberton Chemical Company. I could not tell you definitely whether they were doing business that way up until Mr. Candler bought, but I think that they were—no, not until he bought, because there passed an interim in there that Walker, Vanable and Lowndes had "Coca-Cola." I was in Atlanta all the time during 1887 and 1888. Quite frequently I went down to the place on Marietta Street where "Coca-Cola" was manufactured to get something. The business house there was an old residence, a sort of old rookery, where people rented rooms and things of that kind, and this manufacturing place was in a back room towards Walton Street. They had their office and storage and things—bottles and things—in a room fronting on Marietta Street. My recollection is the number of the house was 107. The building is down there yet, [334] although the number has been changed since—an old red brick building. The equipment and machinery which Dr. Pemberton had for making this stuff consisted of a copper kettle which held forty gallons and which was afterwards turned over to Mr. Asa G. Candler, and a wooden paddle. I did not know Mr. Pemberton very well in 1887 because I was just a mere boy and Doc Pemberton was an old man. I would not natu-

(Deposition of Samuel C. Dobbs.)

rally be much associated with him. All I knew about his business at that time was that I would have to go down there to get a gallon of "Coca-Cola." I was largely sent as an errand boy by Mr. Candler. I was eighteen years old at that time—just a green country boy.

Dr. Pemberton started "Pemberton's French Wine Coca" a long time before "Coca-Cola." A. G. Candler used to buy that in large quantities. That was put up in a bottle—what we call "sixes"—six to a gallon. I do not remember when the trade on that payed out. My recollection is that along in 1887 there was very little, if any, demand for it. We had some in stock, but I do not know whether there was any demand for it or not, but he manufactured it previous to 1886–1887—"Pemberton's French Wine Coca." Candler & Company bought a great deal of it and sold it, but it was not dispensed, it was sold in these bottles as a medicine. Dr. Pemberton made some other preparations, too. I remember the kind of labels Dr. Pemberton used on that "French Wine of Coca." About the only thing I remember that it said on there—I would recognize it if I was to see it now—was "Dr. Pemberton's French Wine of Coca." It was some kind of nerve tonic. I do not remember whether he stated on there whether it was made from some kind of extract of coca leaves and kola nuts, that was too far back. Among other coca wines or kola cordial that were made at that time by various parties was "Vin-Mariani" and "Kolafra." "Mariani" was

(Deposition of Samuel C. Dobbs.)

made up East somewhere. [335] "Vin-Kolafra" was made by Johnson & Johnson. There was "Vin-Mariani"—oh, three or four of those preparations that I do not recall right now, all put up in bottles. I presume they were made out of coca. They carried that inference by the name on them. Along about that time, or just previous thereto, there was quite a little business on that class of product, they had a sort of run on it along in those years. My recollection is that Dr. Pemberton and associates in 1887 also made a "Globe Flower Cough Syrup" and "Indian Queen Hair Dye," something of that sort, I just had a recollection—that only way that I recall it with any kind of definiteness is that somewhere in that period around 1888 or 1889 they, I think, went out of business, either Pemberton Chemical Company or Medicine Company—one was succeeded by the other—and a lot of that stuff was sent up to Asa G. Candler's warehouse on Peachtree Street for storage—"Globe Flower Cough Syrup" and "Indian Queen Hair Dye" and "Stillinga," I recollect having put a lot of the stuff away.

This testimony I have given about transfers from Pemberton, Lowndes and Venable, etc., is not just hearsay; I was with Mr. Candler and knew of the occurrence at the time. I was there when one instrument was signed. Woolfolk Walker was in the office and George Lowndes. I do not recollect definitely whether that was the transfer from Walker and Lowndes to A. G. Candler. I know I was in the office a good deal of the time and knew of the trans-

(Deposition of Samuel C. Dobbs.)

actions going on—knew it as it happened. And then I made a little trip, when Walker, Candler & Company owned “Coca-Cola” down the Georgia railroad for them, and Mr. Walker also traveled out through Alabama. I knew Mr. Walker quite well, and they had an old-fashioned Mathews bottling apparatus in a shed where this 107 Marietta Street is, and some of the goods were sold in bottles then—put up in an old Hutchinson stoppered bottle—I I know I sold some down at Lithonia. When I say “goods,” I mean by that “Coca-Cola.” [336]

I am an officer and stockholder in the Coca-Cola Company. I do not own a great deal of the stock but I own enough to keep the wolf from the door, which I bought and paid for.

Redirect Examination by Mr. ROGERS.

My recollection is that this “Vin-Mariani” I have reference to was a dollar preparation. It was not a beverage, but a medicine—a nerve tonic it was advertised. The same applies to “Vina-Kolafra.” “French Wine Coca” was also sold as a tonic and medicine at a dollar a bottle, I think it was, not as a beverage at the soda-fountain. The copper kettle, which I mentioned a while ago as having been delivered to Asa G. Candler, came from 107 Marietta Street and is the one I referred to as having been used by Dr. Pemberton—it is the one that was in use down there when I first began going down there.

Recross-examination by Mr. LITTLETON.

My recollection is that I was one of the draymen that brought it up—that is as near as I can recollect

(Deposition of Samuel C. Dobbs.)

now I know I was busy helping move the stuff up from his place to Peachtree Street and we put it back down stairs at 147 Peachtree Street. I do not remember the date when this occurred. I do not remember whether it was 1887 or 1890. It was before 1890. It would be difficult for me to fix an occurrence of that kind because it was just running along in the general trend of business. My recollection is that it was in 1888. I could not tell you about what time in 1888, but I remember very distinctly the moving of it up there, because we boys at the laboratory were very much rejoiced that we could get all the "Coca-Cola" we wanted, and we were then putting it up in these little red kegs. My recollection is that it was in 1888 when that forty gallon kettle was moved up there and we were putting up this "Coca-Cola" in red kegs. When I was with them, Mr. F. M. Robinson was doing most of the work then—it was A. G. Candler owned it, and F. M. Robinson really did most of the work getting up the advertising and making the goods. He would make the product like to-day, and next day he would fill it, and he looked after the keeping of the books, of the sales of "Coca-Cola"—mostly memoranda, because [337] the sales did not amount to very much, and I was in and out largely selling, sometimes helping him down there when he needed help.

Re-redirect Examination by Mr. ROGERS.

When I moved that kettle up from Marietta Street to Peachtree Street we also moved some material up there and some printed matter—odds and ends

(Deposition of Samuel C. Dobbs.)

of advertising matter—and the small stuff that had been gotten out. Most everything was hand-made at that time.

“Re-Red.Q. 2. Just everything that had anything to do with ‘Coca-Cola’?”

“A. Just everything that had anything to do with ‘Coca-Cola.’ We went down there with a one-horse dray; I remember the incident quite clearly though I do not remember the date.”

Everything that had been used down there we moved to the basement of 147 Peachtree Street—we cleaned the thing out and took it to 147 Peachtree Street, which was the address of A. G. Candler & Company, wholesale druggists.

Re-Recross-examination by Mr. LITTLETON.

I knew what Dr. Pemberton used down there in the chemical business. I knew presumably everything that he had and used in the “Coca-Cola” business—it was all turned over to us and we moved it up there. The way I know that everything which he used in the “Coca-Cola” business was turned over to us is that I would not assume that he would hold out anything on us. In other words, all I know is that we moved out from that building, when we went down there, what was turned over to us by old man Walker and that crowd. Mr. Robinson can give you more definite information on that than I can; he was there at the time. My recollection is that Dr. Pemberton was not even there at that date, he was very ill at that time.

Deposition of W. L. Sams, for Plaintiff.

W. L. SAMS.

Direct Examination by Mr. ROGERS.

I am twenty-six years old; my address is Atlanta, Georgia, care of the Coca-Cola Company, by which company I have been employed [338] since January 1, 1914. Prior thereto I was about seven years in the drug business—about three and a half years on the road for John Wyeth & Sons. I dispensed soda-water from the time I was ten years old between school terms until I finally got in the drug business. I was a dispenser at Jackson, Georgia, my home town, and at Griffin with Carlisle & Ward, and at Newman with Holt & Kates. Since I have been with the “Coca-Cola” Company it has been part of my business to travel for them portions of Florida, Georgia, East Tennessee, from Chattanooga, into the State of Virginia, portions of West Virginia and part of Maryland. I call on soda-fountains entirely and bottlers. I have made a practical study of people asking for drinks all my life from a retail standpoint in the drug business right up until I went with the Coca-Cola Company. The study was not any stronger, but as strong, since I have been with the Coca-Cola Company. I have been familiar with “Coca-Cola” since I was big enough to look over the counter and look up to the dispenser and ask for it.

“Coca-Cola” all my life has had nicknames, and I have all my life asked for “Coca-Cola” by nicknames, meaning “Coca-Cola”; namely, “dope” and

(Deposition of W. L. Sams.)

"koke," which was taught to me by the public from hanging around soda-fountains. And then, at the age of ten, going to work with the Jackson Drug Company and dispensing "Coca-Cola" when "dope" and "koke" was asked for by the public, I always found that "Coca-Cola" being dispensed gave satisfaction and was what they wanted.

(Testimony as to nicknames objected to by defendants because irrelevant and not warranted by the pleadings. Overruled. Exception.)

The words "koke" and "dope," as applied to a soft drink, mean "Coca-Cola."

(Objected to by defendants as irrelevant and not warranted by the pleadings. Overruled. Exception.)

When, as a dispenser, I dispensed "Coca-Cola" in response to a request for "koke" or "dope," it has never been rejected as not what the purchaser wanted. They have frequently told me that I did not put [339] enough "dope" or "koke" in it, meaning "Coca-Cola" syrup. In my travels above referred to I have never observed any advertising of any soda-fountain beverage under the names "koke" or "dope," and I have traveled week in and week out behind people that were supposed to be selling "Koke" and "Dope," and they never put out a piece of advertising and I never saw any in my life from the time I have been with the Coca-Cola Company and from the time I started at ten years behind the soda-fountain. The man who was selling "Koke" and "Dope" represented the Koke Com-

(Deposition of W. L. Sams.)

pany of America. That is the way his card reads. Exhibit #65 is the card referred to. It was given or handed to me by one of my customers ten minutes after Mr. J. Frank Peck called upon him and left his card stating that he would enter suit if he dispensed any other product but his product when "Koke" and "Dope" was asked for. I came in, he smiled and handed it to me, told me what they were going to do, and I smiled and told him that I did not think they would, and he said "I know they won't because I have been dispensing 'Coca-Cola' for 'koke' and 'dope' all my life and know it to mean 'Coca-Cola,' and that is what the public mean when they ask for it."

(The alleged statement of the dealer to the witness is objected to by defendants because hearsay. Objection overruled. Exception.)

(Plaintiff's Exhibit #65 was here tendered and offered in evidence by plaintiff.)

Cross-examination by Mr. LITTLETON.

I am now advertising man and salesman for the Coca-Cola Company. I represent them in every department that I know how and am capable of doing in my territory—anything from dressing a window down to taking an order. What I tell dealers who are handling other drinks of a similar nature to "Coca-Cola" when I run across them depends upon what it is, that is, whether it is an advertised piece of goods or not. If I run across one, advertising for which I have not seen, I do not have to tell him much,

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he admits that he is dispensing a cola drink for "Coca-Cola." [340]

(Exception by defendants because answer is unresponsive to the question.)

I cannot answer that question as to what I tell him because there is no two men that their human natures are alike and I do not approach every man I call on alike—I am not a poll-parrot, I cannot do it, I cannot approach them that way. I cannot answer your question—that kind of a question—because I do not take a note-book and jot down every line I say to a man that I call on as a salesman, and there is no human being on earth that uses the same line of talk—no salesman. I never saw a card similar to Exhibit #65 that was not given out by Mr. J. Frank Peck, and he evidently gave out those cards only to the men that he called on in my territory because that is the only place that I ever saw one, and he only left one in each place. I did not take any count of the number of such cards I have seen, nor of about how many. I know I have seen more than one. I do not know whether I have seen two hundred, three hundred, five hundred, but I have seen about ten, no more and no less. This is not advertising in my estimation. Mr. J. Frank Peck used it as a card of introduction to the trade direct—to the proprietor—he never gave it to the soda dispenser to put up, nor gave it as a piece of advertisement. It was used by him personally as an introductory card to the proprietor of the store or bar. I have seen no advertising matter of the Koke Company of America except this in-

(Deposition of W. L. Sams.)

troductory card of Mr. Peck's.

I have observed soda-fountain beverages dispensed at soda-fountains ever since I was ten years old. The most and biggest one that I have ever observed is "Coca-Cola." Among others are grapejuice and limeades and lemonades, chocolate milk, buttermilk, and ice creams, strawberry soda and raspberry soda, lemon soda—and, in fact, a good many others that I might think of. Yes, sir, root beer, sarsaparilla, ginger-ale, cream soda. I worked in the south and never dispensed any "Moxie." No, root beer, during the time I have known it, has varied in color. Every man makes it with a different color, with the exception of Hires' Root Beer, and that is the only one I have seen with [341] the same color. Some of the root beer I have seen was light, some dark, but Hires' Root Beer had the same color all the time, you could not distinguish any difference in the color.

Why, yes, sir, I have seen root beer when I was ten years old that had the same color it has today.

Sarsaparilla also varies in color on account of being made by different people, yet I have seen sarsaparilla during the time I have been in business of the same color it is today. Yes, sir, I have seen "Moxie" and it is similar in color to sarsaparilla and root beer. I have never seen birch beer, "Brew" or "Grapvine." At the soda-fountain where I worked they made root beer from root beer extracts, that's sold by all soda-fountain supply houses, and they made sarsaparilla syrup, also, yes, sir. That extract of root beer is a

(Deposition of W. L. Sams.)

dark color similar to the syrup—they call it similar.

Mr. HIRSCH.—General objection to this line of cross-examination.

Deposition of George J. Martin, for Plaintiff.

GEORGE J. MARTIN.

Direct Examination by Mr. ROGERS.

I am thirty-one years of age, reside at Newman, Georgia. I am a traveling salesman for the Coca-Cola Company and have been such since the latter part of February, 1906, except for a short interval when I was with the Upjohn Company, of Kalamazoo, Michigan. Since I first went with the Coca-Cola Company it has been my business to call upon the soda-fountains and jobbers, and when I was with the Upjohn Company I was calling on the drug trade and doctors and also retail businesses. When I first went with the Coca-Cola Company I worked a portion of North and South Carolina and Tennessee, Kentucky, Ohio and Michigan. In the summer months I confined myself mostly to Michigan, half of Wisconsin, Indiana and Alabama. In the winter months I worked into the territory from Canada to Florida. I worked some in Canada during that time, and, since I went with the Coca-Cola Company the second time, I worked towns from Jacksonville to New Orleans and from New Orleans to Savannah, with the exception of Atlanta. I have worked Chattanooga, Birmingham, Meridian, Montgomery, New Orleans, Mobile, Columbus, Macon, Jacksonville [342] and Savannah. Up until a year ago I worked a good many smaller towns, such as Selma.

(Deposition of George J. Martin.)

Cordele, Americus, Waycross, Brunswick, Tuscaloosa, Greenville, Alabama, and such towns as that, 5,000 to 10,000 people. I called on the same class of trade in these various towns. In practically every instance I call on all the soda-fountain people at these various places, unless I get a man who is a substituter and so obstinate that he absolutely refuses to sell "Coca-Cola," and in some instances I ignore him, because I do not want to give him a sign.

I have been about soda-fountains during the time specified in the territory named and have heard people ask for drinks and know the names they use. As a result of my observation and experience the name that is used mostly in my territory in asking for "Coca-Cola" is "dope"—that is the one that I have heard for years; and another one that is used frequently is "coke."

(Objection by defendants to the testimony with respect to nicknames because irrelevant, immaterial and not warranted by the pleadings. Overruled. Exception.)

The words "coke" and "dope," as applied to a soft drink, mean "Coca-Cola."

Mr. LITTLETON.—"We object to that for the same reason. Note a general exception to all that line of examination."

Mr. HIRSCH.—"That is all right, we are willing for you to note a general exception to all such questions to save repeating the objections each time."

I have never seen any advertising of any soft drink under the name of "Dope" or "Koke." I have

(Deposition of George J. Martin.)

known "dope" for about fifteen years, and have heard it constantly, almost daily, ever since. I think the first time I ever heard the word "koke" used, I used it myself. It was during the time I was with Upjohn & Company in Tennessee—I am a good hand to call anything by the shortest name I can, and I go in myself and ask for a "coke." At that time I had never heard anybody else call for it by the name of "coke," but I have heard it for the last seven or eight years, or five or six years, [343] many people go in and call for "dope" or "coke"—the majority of the people in my territory will ask for "dope." When they ask for "dope" they want "Coca-Cola." I was dispenser down here a good many years ago,—ten years ago—possibly eleven,—down here at Newman for Holt & Kates, and the majority of people that came in would say "give me a dope." I sold them "Coca-Cola" because Holt & Kates had nothing in the house in the way of a syrup except "Coca-Cola" syrup. None of these people who came in and asked for "dope" and got "Coca-Cola" stated that that was not what they wanted. I understood that they meant "Coca-Cola" when they asked for "dope."

Cross-examination by Mr. LITTLETON.

I won't say that I have never in all my life seen any cola or caffeine-containing soda-fountain beverages advertised under the name of "Dope." I don't recollect any, I don't know of any. No, sir; I have not since I have been with the Coca-Cola Company. I do not know of noticing any before that,—I heard it rumored years ago, it's been twelve years ago, here in

(Deposition of George J. Martin.)

Atlanta, Georgia, a thing came out and they called it "Dope," but it did not last but a very short time before it was 'squashed,' but I never seen any since nor did I ever see it advertised. I did not say it was advertised; the only thing I heard was that a drink called "Dope" was on the market. I do not know who it was manufactured by. The only time I heard about it, I went to a soda-fountain and asked for a "dope" myself and the boy said, "Don't call for 'dope,' you might get stung, call for 'Coca-Cola.' " I was pretty young, I did not know anything about the business world, Coca-Cola Company or anything. The first I ever heard the name "koke" applied to any soda-fountain beverage was something like six or seven years ago when I, myself, applied for that.

[344]

Yes, I heard the rumor that went around that "Coca-Cola," the product manufactured by the Coca-Cola Company of Atlanta, Georgia, contained cocaine.

(Objected to by plaintiff because irrelevant and incompetent and not based on direct examination of the witness.)

It was during the time—1907—that we had some trouble with the Government. I read several articles at that time about what Mr. Wylie had said it contained. Yes, I have run across people who thought it contained cocaine. I ran across one man up in Michigan and he and I had a very long argument about that.

(Deposition of George J. Martin.)

(Objected to by plaintiff as irrelevant and immaterial.)

Oh, yes, sir, I hear “Coca-Cola” asked for as “a shot” or “a shot in the arm.” If I ever heard anybody ask for it as “poison”—“give me a poison”—I do not recollect it.

(Same objection by plaintiff.)

Yes, in my experience as a traveling man visiting druggists and soda-fountains over the country I have observed other beverages dispensed from soda-fountains of a similar color to “Coca-Cola.” “Koke” and “Dope”—it has a similar color to “Coca-Cola.” “Gay-Ola” had a similar color, and I have seen several substitutes on the market that had a similar color. I say “substitutes” because it is something that people put off in the place of the other—something that people put out to take the place of the genuine,—that’s what I believe. In fact when I was in the business I knew it—well, I knew it as well as I know anything, because if I ever went into a store before I went to work—that is during the time I was away from the Coca-Cola Company, and asked a man for “Coca-Cola” and was served anything else, he and I had a fuss right there and then, even with my best friends. I went to a place in Nashville and called for a “Coca-Cola” and he served me with another article and he and I had an argument and it resolved into a bet, that’s how firmly I knew it. I had never heard anybody [345] walk up to a fountain and call for any of these substitutes by their regular name. The only way they have been

(Deposition of George J. Martin.)

sold is when they ask for "dope" or "koke" and that would be pushed out and nothing said.

The first time I ever saw root beer dispensed from a soda-fountain was ten or fifteen years ago. The first "Coca-Cola" I ever had was about seventeen or eighteen years ago at old Dr. E. B. Terrell's drug-store at Greenville, Georgia,—I remember it distinctly. I did not know what root beer was then. Oh, yes, I had seen sarsaparilla. I do not remember whether that was about the same color then that it is today. I have never studied the colors of sarsaparilla and root beer. No, sir, it was not white, it was kind of red—something similar to a dark brownish red. I would not say it was the color of "Coca-Cola." Root beer is not the color of "Coca-Cola" at all,—that is, the root beer I have always seen. In the first place it foams like beer—that is, the root beer I have drunk—and another thing it is darker. I could not answer as to whether it would appear similar to the color of "Coca-Cola" to a casual person looking at it in a soda-fountain. No, sir, I never thought that. It has never occurred to me at all. I would not say that there is a big wide difference in the color of root beer and "Coca-Cola." I never gave it a thought. I never compared the two,—they are so different in taste. The only drink I ever compared with "Coca-Cola" was something I thought they were putting out as an imitation. I have seen a product on the market known as "Afri-Cola." That's a similar color to "Coca-Cola." The first time I saw that was two or three years ago. I do not think it

(Deposition of George J. Martin.)

tastes like "Coca-Cola." Every time I have been served with an "Afri-Cola" yet I have always distinguished—always proven—twice lately—that the man was selling "Afri-Cola" for "Coca-Cola." I always have told the difference in taste immediately. Well, I won't say that I am an expert on the taste of these drinks. That depends on a great many things—some days if I am in doubt about my taste I might go back to the same fountain several days so as to be sure. [346] Suppose my liver is out of order, then my taste would be affected, and I would go back there may be every day for a week, because I would never want to accuse a man unless I knew I was right. I would say "Gay-Ola" is something similar to "Coca-Cola" in a way. Yes, I have seen "Ko-Nut" to know it, in about three years, and that one was about the worst drink I ever got in my life, and it was blacker than "Coca-Cola," but since then I have seen "Ko-Nut," but not drunk it, and they have changed the color. It was not the same color as it was two or three years ago. That is my opinion, however.

Yes, I have noticed the kinds of barrels that "Ko-Nut" and "Afri-Cola" are shipped in—in fact it is just as near an imitation of the "Coca-Cola" barrel as your eye could see—a red barrel minus the label. Yes, I have seen other so-called "cola" beverages or caffeine containing soda-fountain beverages shipped in barrels of the same color as "Coca-Cola." One is "Koke"—I saw three of them. It was here in town, and I, on first sight, or anybody, would have thought

(Deposition of George J. Martin.)

it was a "Coca-Cola" barrel, until I examined it and found there was no label on it. I saw one out from Jacksonville at Pueblo Beach and the reason I knew it was a "Koke" barrel, I asked the proprietor what was in it. When I first asked him, he said it was a "Ko-Nut" barrel. I said, "How do you know" and he said, "I will get the bill of lading and show you," and it was not "Ko-Nut" but it was "Koke,"—so he himself was mixed up until I saw his bill of lading from New Orleans. I do not recollect having seen "Wise-Ola" barrels. I have never inspected "Rye-Ola" barrels closely. I have never been troubled with "Rye-Ola" in my territory. Most of it, I think, is sold in bottles, so I have never had occasion to examine the bottles. Yes, I have drunk "Koke."

"XQ. 55. You could tell right off it wasn't 'Coca-Cola,' couldn't you?"

"A. Well, of course, I got it out of a 'Koke' bottle—

Mr. HIRSCH.—"We object to this line of examination for the reason stated in our former objections.")

"He told me it was a 'koke' and I drank it. He said, 'I [347] want you to try it' and got it, and I tasted 'Coca-Cola' also, and it was similar, it was similar to 'Coca-Cola.' If he had given it to me, and I hadn't seen the label on it, I don't know what I would have thought."

Redirect Examination by Mr. ROGERS.

In my cross-examination where I have referred to

(Deposition of George J. Martin.)

“Coke” barrels and to “Koke” in bottles, I was referring to the product of the Koke Company of America.

“ReDQ. 2. Will you state whether the word ‘Coke’ to the public, consumers of beverages, refers to this product, or is it a nickname for ‘Coca-Cola’?”

“A. Why, it is a nickname for ‘Coca-Cola.’ I never knew there was a product on the market by that name until this year.”

Recross-examination by Mr. LITTLETON.

Here are some of the customers that I called on in my territory, and we took addresses of the customers who came in there and what they called for. There was about forty. These are taken from the Midland Pharmacy, Macon, Georgia. I saw Mr. Green, who was the head prescription man, and also Mr. Mack, the manager, and asked these gentlemen what they would give a man when the word “coke” or “dope” was called for. “Why,” he said, “I have not got anything in my house but ‘Coca-Cola,’ and they have been calling for that for years.” I said, “I would like to prove that statement”—that we would like to find out absolutely what they want. So each one that called for “dope” I would have the dispenser ask what they meant, and every man that asked, and who was asked back, would say “Coca-Cola,” and, as one man expressed it, “What in hell do you think I would walk four blocks for but ‘Coca-Cola’?” And I went over to Lamar-Washington’s drug-store and the same thing happened there. Never yet, in all of my experiences, has a single man, when asked what he

(Deposition of George J. Martin.)

meant by "dope," said he wanted anything other than a "Coca-Cola"—they would all say "'Coca-Cola,' certainly." I did not say that every man who calls for "coke" or "dope" means "Coca-Cola." [348] I said every man I had interviewed or had anything to do with, every man that has come into my personal knowledge, has always come back and told me that.

Deposition of F. M. Robinson, for Plaintiff.

F. M. ROBINSON.

Direct Examination by Mr. HIRSCH.

I reside in Atlanta, Georgia, Briar Cliff Road. I came here from Lyons, Iowa, in December, 1885, accompanied by Mr. D. D. Doe. At that time I was interested in a chromatic printing device with Mr. Doe and we were going around looking to make some arrangements for disposing of that printing device. In looking over the patent medicine advertisers here in Atlanta we came in contact with Mr. J. S. Pemberton and Ed. Holland, associated together in the medicine business called, then, the J. S. Pemberton Company. We presented our advertising device to them and, in discussing that matter and other matters in connection with the patent medicine business, they proposed an arrangement whereby we should unite our enterprises into a stock company. Messrs. Pemberton, Ed. Holland, D. D. Doe, and I, then formed a stock company known as the Pemberton Chemical Company, a copy of the charter of which is the paper exhibited to me. After this corporation was started the amount of business done was small. Dr. J. S.

(Deposition of F. M. Robinson.)

Pemberton had been, in previous years, a druggist, but he was then what you might call a manufacturing chemist. He put into the corporation several preparations the principal of which was "Pemberton's French Wine of Coca," which was a patent medicine selling at a dollar a bottle, and there was a preparation called "Gingerine," "Indian Queen Hair Dye" and "Pemberton's Globe Flower Cough Syrup." During that period Dr. Pemberton was continually experimenting on other drinks and chemical combinations. Well, he was not compounding anything particular at that time, I think, outside of these that were put into the business and until the time of this preparation, "Coca-Cola." The preparation, "Coca-Cola," was not made immediately after the organization of said company, but several months afterwards it was, some five months, I [349] guess, after this charter was applied for. We commenced making what we called "Coca-Cola" in May, 1886. I was assisting in the manufacture of "Coca-Cola" and in putting it on the market and selling it. Well, they continued in business, I suppose, a year—I do not remember definitely, I could find out, perhaps—after that, selling these various preparations, including, after May, 1886, "Coca-Cola." This product had no name in the beginning,—it was being experimented upon. Dr. Pemberton compounded a preparation, it was taken down to Mr. Venable's soda-fountain for the purpose of trying it to ascertain whether it was something the people would like or not, and, after

(Deposition of F. M. Robinson.)

they had made various changes in the compound, it seemed to be satisfactory and then the question came up with reference to having a name for it. There were four of us in the corporation and they agreed to submit four names, each one of the members submitting a name. I submitted the name "Coca-Cola" and it was afterwards adopted and used. At that time we were doing a small business in everything. The purpose of this drink "Coca-Cola" was to use it at soda-fountains as a beverage. I suppose D. D. Doe was in the business perhaps nearly a year, and he and myself jointly owned this printing enterprise and put that in as our part of the formation of this Chemical Company. After being in, perhaps, something like a year, Doe sold out his Chemical Company interest, surrendering his stock and taking the printing enterprise and carrying it away with him. I do not know as anybody came in immediately after that, but subsequently a man by the name of M. P. Alexander came in. Well, after the preparation had been on sale by the Pemberton Company for possibly a year—they were manufacturing it and selling it as the product of the Pemberton Chemical Company—suddenly Dr. Pemberton announced he had secured a trademark on "Coca-Cola" in his own personal name and that it was not the property of the Pemberton Chemical Company, and that he had sold it to Lowndes and Venable, I believe, were the parties. I thought he had no right to sell it, as I regarded it as property belonging to the Pemberton Chemical Company, of which I owned one-fourth interest; and I

(Deposition of F. M. Robinson.)

went to Judge Candler, as an attorney, to see if he did not think [350] I could have my rights maintained, and he looked into the matter, investigated it, and finally came to me and said Dr. Pemberton was not worth anything—there was nothing that was tangible in sight—and he advised me to drop it and give it up. Thereupon, I immediately went out, sold out my stock to Dr. Pemberton. After that I did not have any business until I came into the manufacture of “Coca-Cola” again, very shortly afterwards, for Walker, Candler & Comany. A man by the name of Woolfolk Walker, and Mr. Asa G. Candler, composed that firm. Dr. Joe Jacobs was not a member of that firm that I remember—he had an interest in it before that, I think. I then went to work for Walker, Candler & Company, making “Coca-Cola” at 107 Marietta Street, where the Pemberton Chemical Company had been all through their history, and we continued to manufacture “Coca-Cola” at the same place, but it was taken away from there temporarily. That is the only thing we manufactured at that time.

“Q. 47. You continued right along with the tools and appliances that they had there with Walker, Candler & Company?”

“A. Yes, sir.

“(Objected to by defendants because leading and suggestive. Overruled. Exception.)

We used there the same appliances that had been used in the manufacture before—brought back from another place.

(Deposition of F. M. Robinson.)

“Q. 50. That belonged to the Pemberton Chemical Company?”

“A. Yes, sir, that formerly belonged to the Pemberton Chemical Company.

(Defendants object to the question and answer because the question is leading and suggestive. Overruled. Exception.)

The paper marked “Plaintiff’s Exhibit #67,” with the name of F. M. Robinson on the bottom of it, is my signature thereon. I witnessed that paper.

“Q. 53. Did Wolfolk Walker and Mrs. M. C. Dozier sign that in your presence?”

“A. Yes, sir.” [351]

I continued the manufacture for Walker, Candler & Company as long as they together owned the preparation. After that I went with Mr. Asa G. Candler in his drug-store and the materials and appliances were moved to the basement of his drug-store—it was then, I believe, 63 Peachtree Street, it is not the same number now. I continued the manufacture of “Coca-Cola” and also had charge of his city books in his drug-store. No, sir, the signature attached to Plaintiff’s Exhibit #68 is not mine, that is Ed. Holland’s. I know Mr. Ed. Holland’s signature,—this is a communication that he directed to me during the time of the Pemberton Chemical Company and I was Secretary of the Company.

The paper marked Plaintiffs’ Exhibit #69, is a statement made up by myself from such records as we had in the company in regard to the advertising expenses, etc., in the early history of “Coca-Cola”—

(Deposition of F. M. Robinson.)

advertising expenses for advertising "Coca-Cola." This was delivered to Mr. Hirsch on yesterday, the 27th of July, 1914. Plaintiffs' Exhibit #70 is a copy of the record of sales of "Coca-Cola" made by me from the original entries by myself—the quantity and price, beginning with March 9, 1887, and this paper was given by me to Mr. Hirsch on July 27th. That paper has been in my possession since 1887. The three books of records marked Plaintiff's Exhibit #71, I recognize as books having been made up by myself relating mostly to the sales of "Coca-Cola,"—partly in regard to advertising of "Coca-Cola." This record goes back to 1886 and it's to 1900—I think possibly some of them further—1902—I recognize them all as having been gotten up by myself and they were delivered to Mr. Hirsch at some time previous, I do not know exactly when. I recognize the cards marked Plaintiff's Exhibit #72. They are little advertising cards gotten up by myself about 1892, showing the increase in sales of "Coca-Cola."

After I was with Walker, Candler & Company, I remained with Asa G. Candler continuously until the Coca-Cola Company was formed. No, sir, I did not continue in charge of the manufacturing of "Coca-Cola" except for a short time under Mr. Asa G. Candler, while he [352] owned it, individually, at which time I was connected with the manufacturing of "Coca-Cola" and the keeping of the city books—while he was in the drug business. After he went out of the drug business I was the advertising man-

(Deposition of F. M. Robinson.)

ager. Immediately after I finished my work with Asa G. Candler, I went with the Coca-Cola Company. I held the office of Secretary of the Coca-Cola Company from 1892, the date of its organization, until last February (1914), twenty-two years. This product under the name "Coca-cola," as I have described it, has been known and sold under the name "Coca-Cola" continuously from 1886 up until the present time.

Cross-examination by Mr. LITTLETON.

As near as I can remember the exact date Mr. Pemberton perfected this drink called "Coca-Cola" was in the month of May, 1886. From May, 1886, until May, 1887, I think he sold 25 or 30 gallons may be, something like that—a very small quantity—mostly sort of experimental. It was shipped in the first place in jugs and cans—some of it was shipped in gallon tin cans, and then a little later in small kegs, which bore printed labels. The product was never called "Coca-Cola Syrup and Extract" in any printing of any kind. He never had any labels printed at that time "Coca-Cola Syrup and Extract" that I remember. It was "Coca-Cola," nothing else. No, sir, I don't think he had on his letter-head "Coca-Cola Syrup." The letter-head on the monthly statement marked and filed as Plaintiff's Exhibit #70, reads "Coca-Cola Syrup," there. That is written in block letters, I suppose you would call it. No, I could not particularly describe the style of labels that he used on his containers containing this product, except it was "Coca-Cola"—prob-

(Deposition of F. M. Robinson.)

ably something in reference to it, in addition. I don't remember whether it said "Coca-Cola" or "Coca-Cola Syrup and Extract"—I never saw the word "extract." I don't think the word "syrup" was attached to any label, within my memory. I remember how the words "Coca-Cola" were written.

[353]

Yes, sir, I testified in an interference proceeding in the Patent Office in Washington in 1892 in an interference between a man named Kent and another named Beerman and the Coca-Cola Company, and in that proceeding I testified that I originated the word "Coca-Cola." I do not remember that I stated the reasons why I gave it that name.

"XQ. 19. Well, to refresh your recollection, I will ask you whether or not you were asked these questions and answered as follows: '(Q.) Do you know the origin of the word 'Coca-Cola' as applied to a tonic beverage?' '(A.) Yes.' '(Q.) What is it?' '(A.) I was the originator of the word. The syrup was given this name on account of the extracts which it contained, 'coca' and 'cola,' made from coca leaves and from the cola-nut.' Did you testify that? '(A.) I expect I did.'"

Yes, that is true as far as it goes. It only explains in part the object in giving its name,—it was simply to give it a name to be advertised by and to be called for, and the word "Coca-Cola" don't explain what there was in it. I know what the compound is and was. It is true that might have been one reason why the name suggested itself to me, was because

(Deposition of F. M. Robinson.)

of the fact that there was in it the properties of "coca" leaves and of "cola" nuts and that may have been one reason why it was given that name; but the object in giving it its name was to have a name to be advertised by, and called for, and things of that kind, and not a description of the contents—there was dozens of other things that went into it that don't appear in the name. I don't deny now that I swore in this Washington proceeding in the Patent Office that I gave it its name on account of the extracts that went into it, do I? I am giving you additional reasons why the name was given to it.

No, I did not get mad and go out of the business along about the time Dr. Pemberton had a registration of the "Coca-Cola" label or trademark in the Patent Office. I felt that I was being defrauded of my rights, and that the product belonged to the Pemberton Chemical Company, and that I had my rights in it, and went to Judge Candler, as I [354] stated a while ago, and asked him about defending my rights and he advised on account of circumstances and conditions just to let it drop, and I did. I expect that was about July, 1887. I sold my stock in the Pemberton Chemical Company, as I remember, to the Pemberton Chemical Company, that is, I sacrificed my stock—gave it up. At that time, besides myself and Dr. Pemberton, Ed. Holland and M. P. Alexander owned stock in the Pemberton Chemical Company. The next I had anything to do with this same product was Walker-Candler & Company. I don't remember the date. I presume it was

(Deposition of F. M. Robinson.)

August, 1888—the date is here in these records and papers. I was out for a month or such matter after I left the Pemberton Chemical Company, and it was not very long until this Walker, Candler & Company started up—I don't think it was more than a month that I was out entirely. While I was with Pemberton in the Pemberton Chemical Company, before I got out, we were all interested, just at the beginning, in the making of this "Coca-Cola" and I compounded—I mean that I assisted him in the compounding and mixing and heating of the preparation—the cooking that was necessary. No, sir, I don't remember who it was we bought our fluid extract of coca from at that time. We bought coca leaves and made it ourselves. No, sir, I could not remember the process now by which we extracted or made the fluid extract of coca. Dr. Pemberton was the chemist in the matter. I am not a chemist now, was not then, never have been, and don't claim to be. I just stood around the place where he was making it and helped to put the ingredients in. There was not much machinery used in making this product. There had to be percolators in making these fluid extracts and there was a brass kettle containing, I think, forty gallon capacity,—not much in the way of machinery, at that time. He mixed it with a paddle, just in the kettle. Yes, sir, I helped him make "Pemberton's French Wine Coca." Yes, sir, he used coca and cola nuts in the preparation of that, and a wine. Well, the sales of "French Wine Coca" were fairly extensive, we thought it was pretty good

(Deposition of F. M. Robinson.)

when we went into it. That was his leading article at that time. [355] "Coca-Cola" was not a side line, but became the leading article almost immediately after it's manufacture and everything else almost laid aside after it's manufacture, but the "Wine of Coca" was the principal thing when we went into it. Yes, sir, from July to October or November, 1887, "Coca-Cola" was his principal product and "Wine of Coca" just dropped back. The thing he was pushing all the time was "Coca-Cola." I remember there was very few barrels shipped at that time, but I think they were the same color as now—they were painted red. No, I don't remember the kind of lettering he used on his tags and labels for "Coca-Cola" back there in 1886 and 1887. I would not be able to describe the label except that the word "Coca-Cola" was always the prominent thing. Yes, sir, "Coca-Cola" was just printed on there, just a printed label. No, it was not in block letters, the word "Coca-Cola" always had the same form from the very beginning. I was practically the originator of that form. Some engraver here by the name of Frank Ridge, was brought into it and he and I worked out that form of that word "Coca-Cola," and when this label was registered in the Patent Office it was registered in that same form. This "Wine of Coca" I refer to was of a dark red color. I don't know that I could definitely give any information about any other preparations made by others that were similar to that "Wine of Coca" at that time. Preparations of that kind were not numerous

(Deposition of F. M. Robinson.)

at all, there was scarcely anything on the market, so far as my information goes, under the name of "Coca" preparations or "Cola" preparations. Well, my experience in that respect was not so very limited, perhaps. At that time Cola nuts or the extract from cola nuts was a very expensive article and very little in use, that is my understanding of the matter.

No, sir, I did not know at that time the product similar to this made from coca and cola nuts by Parke, Davis & Company, but I have some knowledge of a preparation being made by Mariani & Company, I don't remember the name of it now. No, sir, I do not know of any similar preparation made by Myer & Company or by Balfour, of Boston. [356] I could not give absolute testimony as to whom we purchased our coca leaves from at that time. I think Parke, Davis & Company, probably, but I am not certain. I could not tell you from whom we bought our cola, we bought cola-nuts mostly.

I am now a stockholder and director in the Coca-Cola Company. I resigned in February of this year (1914) as Secretary, and William Candler succeeded me as such.

No, sir, when I quit the Pemberton Chemical Company and withdrew from it, Dr. Pemberton did not continue to manufacture "Coca-Cola." Before I left it was taken away to Jacob's drug-store, I think it was, that is, whatever they had for the purpose of manufacturing "Coca-Cola."

(Deposition of F. M. Robinson.)

“XQ. 72. And are you positive that Dr. Pemberton did not continue to manufacture anything like that there?”

“A. He sold it and the stuff was taken away, that is as far as I can give you information.”

It was taken away immediately after the sale. You have the dates of sale here in the record. I mean the sale to Venable & Lowndes. No, sir, after that sale to Venable & Lowndes, Dr. Pemberton did not continue to manufacture anything at this place. Directly after that, I don't know just exactly how soon, they moved away from that place and they formed the Pemberton Medicine Company—I don't know that that is my business to be giving you—they moved away over here. I have lived here continuously since then. Dr. Pemberton and some other gentlemen formed the Pemberton Medicine Company sometime after that. I think they operated on South Pryor Street. They did a medicine and extract business, they manufactured these articles that are enumerated there in the Pemberton Chemical business. I think they did manufacture drinks—Cola's—to some extent but have no personal knowledge. We considered the demand for “Coca-Cola” good at that time, it would not be now. The records show about how much “Coca-Cola” was sold in 1888. I don't remember how much, or about how much. In 1888 we were doing [357] business at 107 Marietta Street for Walker, Candler & Company. At that time the Pemberton Medicine Company was somewhere on Pryor Street, I think. I was engaged

(Deposition of F. M. Robinson.)

in the manufacture of "Coca-Cola" and nothing else.

"XQ. 91. And they (Pemberton Medicine Company) were manufacturing similar drinks?

"A. I don't know about that.

"XQ. 92. You knew they were putting different drinks on the market, didn't you?

"A. I knew scarcely anything about it.

"XQ. 93. You knew they were manufacturing drinks and putting them on the market?

"A. I heard they were manufacturing drinks, yes, sir.

"XQ. 94. That was part of the history of the community, that they were doing that?

"A. Yes, sir."

As to the associates whom Dr. Pemberton had in the Pemberton Medicine Company, I just remember that a man by the name of Mayfield was one of them, and a Mr. Bloodworth was another one—I don't remember his name now—Murphy, I guess it was. I have been with the "Coca-Cola" Company continuously since then, and am now a director of the Company. I do not remember what year Dr. Pemberton died. He had a son named Charles M. I don't hardly know whether or not he was connected with the Pemberton Medicine Company. I think so, but I don't know. He died shortly afterwards himself. I don't remember when Dr. Pemberton died, but I remember that he did die about that time. I don't know whether the business of the Pemberton Medicine Company at that same place continued after his death, I don't remember.

(Deposition of F. M. Robinson.)

Yes, sir; I said the kettle was moved from 107 Marietta Street about the time I got out of the Pemberton Chemical Company—I don't know about the kettle being moved, I am not so sure, but I think it was. I mean all the things that Pemberton owned were moved to Jacobs' basement—Venable's basement probably might be better. Venable and Jacobs were in the same building. Venable had the soda-fountain business in Jacobs' drug-store. Yes, sir; those things stayed there [358] a short while until Walker, Candler & Company began to make this product. I don't know about Mr. Dobb's personally going down to 107 Marietta Street in 1888 and removing all of the appliances for making "Coca-Cola," which Dr. Pemberton had used, to Asa G. Candler's place of business. I don't know that part of it—that is something I don't know, sir. If they had been moved in July or August, 1887, they could not have been moved again in 1888, no, sir.

When I was associated with Dr. Pemberton, I had some knowledge of the soda-fountain business, just here. I suppose sarsaparilla was sold at that time, but I don't remember. I don't remember about root-beer, birchbeer, or ginger-ale, either, I could not remember about them. I don't remember any other drink on the market at that time of the same color as "Coca-Cola" is now, or substantially the same color. I expect there was, but I don't remember it, I don't know anything about it. No, I don't know whether "Coca-Cola" was the only drink on the market at that time of that same color. I know there is such

(Deposition of F. M. Robinson.)

a firm as Hagan & Dodd in Atlanta, but I am not personally acquainted with them. I could not tell you how long, or about how long, they have been in business. I have known this firm, I expect, ten or a dozen years, maybe more, I don't remember. I see by the papers they are making a product called "Ko-Nut." I don't know anything about that. No, sir, I have never seen any "Ko-Nut," I would not know it if I was to taste it. I have seen their wagons carrying that stuff on the streets. I don't know the color of their barrels or kegs; I don't know as I ever saw any of them. I don't know the color or the taste of that drink. Just to make a guess at it, I would imagine I have seen Hagan & Dodd's advertising, either "Ko-Nut" or "Afri-Cola" about ten or a dozen years. It has been a good while. During all of that time I was Secretary of the Coca-Cola Company. I do not know how long the drink called "Rye-Olo" has been on the market. No, sir; I don't know any more about that drink than I do about these others, I don't know anything personally about it. No, sir; I don't know that I have seen any of it. [359]

Redirect Examination by Mr. HIRSCH.

The other products that were gotten out by the Pemberton Chemical Company, aside from "Coca-Cola," were "Pemberton's French Wine Coca," "Globe Flower Cough Syrup," "Indian Queen Hair Dye," and a preparation called "Gingerine." So far as I know it went from the Pemberton Chemical Company to the Pemberton Medicine Company.

(Deposition of F. M. Robinson.)

Those preparations were medicines, not beverages. In stating in my cross-examination about other objects we had in mind in giving the name "Coca-Cola" to the product, I meant that I didn't regard it as describing the properties in the syrup because there were maybe a dozen other ingredients that also went into it. I just simply took that as a name, similar to other advertising names, thinking that two "C's" would look very well in an advertisement, and called it "Coca-Cola." During the time I was with Dr. Pemberton, and the Pemberton Chemical Company, he was always experimenting on various things. He was experimenting very much with this drink called "Coca-Cola" for some considerable time.

"ReDQ. 10. He sold the 'Coca-Cola' business to Venable & Lowndes, did he not?"

"A. Yes, sir."

(Defendants object to the question and answer because the question is leading. Overruled. Exception.)

Well, my understanding is, he sold it to Messrs. Venable & Lowndes. Dr. Pemberton told me he had sold it to Venable & Lowndes. It is my understanding that Venable & Lowndes actually took the business over.

"ReDQ. 17. To your knowledge did Pemberton actually deliver the material to Venable & Lowndes for manufacturing 'Coca-Cola'?"

"A. Yes, sir."

(Objected to because leading and suggestive.)

(Deposition of F. M. Robinson.)

Overruled. Exception.)

It went into the basement of Jacobs' drug-store, in Venable's department at the corner of Marietta and Peachtree Streets. From that place it went back again to 107 Marietta Street and from there it went to Asa G. Candler's drug-store, 63 Peachtree Street. [360]

Recross-examination by A. B. LITTLETON, Esq.

No, sir, I did not witness the sale of the "Coca-Cola" business by Dr. Pemberton to Lowndes and Venable. The statement of Dr. Pemberton, and the place where it went to, is the source of my knowledge on the subject. As I remember it, all the material for the manufacture of "Coca-Cola" went there. No, sir, I was not connected with Lowndes and Venable. No, I could not swear that all the material landed there. No, I don't know that I could testify as to whether or not Dr. Pemberton sold a part of that material to other parties. No, I have no knowledge of whether or not he transferred it to other people contemporaneously with the transfer to Lowndes and Venable. No, sir, I don't know what Pemberton, Mayfield, Murphy and Bloodworth manufactured. I did not investigate it. I don't think I was ever in their place of business. I don't know how much of this "Wine of Coca" and cough syrup they manufactured. The only knowledge I have as to whether or not they manufactured any cola syrups was acquired by observation. Yes, I observed that just like I did Hagan & Dodd's, what comes out. No, I don't know anything about the quantities they man-

(Deposition of F. M. Robinson.)

ufactured or sold, but I know just as well as I know that Hagan & Dodd manufacture "Ko-Nut," but I don't know anything about the extent of it.

In referring to the fact that all the "material" for making "Coca-Cola" was removed, I mean coca leaves, fluid extracts, cola nuts, percolators, and everything of that kind,—everything that was used in the manufacture. Well, Dr. Pemberton had percolators and things of that kind in his place of business at that time for making "Wine of Coca" and these other products—some of the same material, perhaps, went into both. I could not tell you how many percolators he had, but he had quite a number of them. Percolators are made in any size, probably these might have been eight or ten gallons capacity,—something of that kind,—and he had quite a number of them. He had a mixing tank for the "Wine of Coca" preparation. He did not mix the "Coca-Cola" in that. [361] The "Coca-Cola" was mixed in the kettle—I don't know but there was some "Coca-Cola" manufactured in the same tank, mixed in the same tank as the "Wine of Coca," possibly. When he moved all the materials he moved all his coca and cola over to Lowndes & Venable's. No, he did not sell the "Wine of Coca" business to Lowndes & Venable. Yes, coca leaves and cola nuts were used in manufacturing "Wine of Coca." Yes, so far as I know he kept on making "Wine of Coca" there—not there, that was taken to this other place. After that he made it down on Pryor Street, somewhere. Directly after he sold to Lowndes & Venable—that was

(Deposition of F. M. Robinson.)

about July, 1887—he moved, shortly afterwards (and before September or October, 1887) to South Pryor Street, I don't remember the number of the place. I could not testify as to whether or not he took any coca or cola nuts down to South Pryor Street with him. I did not say that all the coca and cola nuts he had at 107 Marietta Street went to Venable & Lowndes. I don't know how it was divided. The fact of the business is it has been so long ago that my recollection of what did go to Lowndes & Venable—it is hard to remember that far back, and my recollection is very hazy on that.

Deposition of Oscar Cliff Hightower, for Plaintiff.

OSCAR CLIFF HIGHTOWER.

Direct Examination by Mr. ROGERS.

I am thirty-one years of age, reside at Columbia, South Carolina, am traveling for the Coca-Cola Company, and have been doing so for the past three years. Before that I was with the Blue Seal Ice Cream Company. Since I have been traveling for the Coca-Cola Company, my territory consists of South Carolina and the towns I make are Columbia, Charleston, Greenville, Spartenberg, Anderson, Orangeburg. I call in all towns where they sell "Coca-Cola" from the fount. I call on those dispensing "Coca-Cola," whether confectionery stores, supply stores, drug-stores or otherwise. Yes, sir, I am about the soda-fountains in these varions stores and know how people ask for the drinks they want. [362] In traveling over my territory I make the larger cities every

(Deposition of Oscar Cliff Hightower.)

four months, the smaller ones about once a year. I am on the road constantly. Yes, in my experience, and in the traveling referred to, I have discovered that there are nicknames for "Coca-Cola." Yes, sir, "Coca-Cola" and "dope" are the names, nicknames for "Coca-Cola,"—"coke" and "dope," I mean, are the nicknames for "Coca-Cola," yes, sir. The words "coke" and "dope," as applied to a soft drink, mean "Coca-Cola."

(Defendants object to said testimony as to nicknames because irrelevant and not warranted by the pleadings. Overruled. Exception.)

I have never seen a piece of any advertising of any soft drink under the name of "Koke" or "Dope."

Cross-examination by Mr. LITTLETON.

Yes, sir; I have heard "Coca-Cola" called a "shot." No, sir; I don't believe I ever heard it called "powder" or "poison." Yes, sir; I know why the people call it "coke" or "dope"—it's a short name for "Coca-Cola." No, sir; "dope" is not an abbreviation for "Coca-Cola," it's just a short name—a nickname. The word "dope" means various things. A book-maker on a race-horse track—why, they use it in baseball "getting the 'dope' on the players." Yes, sir, yes, sir; I have heard it used in reference to a "dope fiend," applied to a cocaine fiend, yes, sir.

Deposition of M. Tomlinson, for Plaintiff.

M. TOMLINSON.

Direct Examination by Mr. ROGERS.

My age is 25 years, residence, Columbia, Tennessee, occupation, representative of the Coca-Cola Company. I have been connected with the Coca-Cola Company two and a half years and my business consists of anything that the company sees fit for me to do. I travel for it over the state of North Carolina and a part of the State of Virginia. I make the cities of Ashville, Charlotte, Greensboro, Winston-Salem, Danville and into Norfolk. I call on the wholesale and retail druggists and soda-fountain dispensers. Yes, sir; I know the names used by people when they ask for drinks. Yes, sir; I am familiar with [363] "Coca-Cola." Yes, sir, in the traveling, experience, and observation referred to, I have discovered that there are commonly used nicknames for "Coca-Cola," which are "koke" and "dope." The words "dope" and "koke," as applied to a soft drink, mean "Coca-Cola."

(Objected to by defendants because irrelevant and not warranted by the pleadings. Overruled. Exception.)

No sir, I have not seen any advertising of any product under the name of "koke" or "dope."

Cross-examination by Mr. LITTLETON.

No, sir, I don't know of any other cola or caffeine containing soda-fountain or soda beverage on the market today besides "Coca-Cola."

Deposition of Magnus L. Ramey, for Plaintiff.**MAGNUS L. RAMEY.**

Direct Examination by Mr. ROGERS.

I am 25 years of age, live in Atlanta, Georgia, and am a representative of the Coca-Cola Company, and have been such for four years. I am a traveling salesman and cover Atlanta, East Tennessee and the northern part of Alabama—mostly confined to Atlanta. I make about 200 small towns, of a population anywhere from 200 to 15,000 or 20,000 and I call on the soda-fountain trade in those towns. Yes, sir, I am familiar with “Coca-Cola.” Yes, sir; in calling on the soda-fountain trade I come in contact with dispensers and with the public who frequent soda-fountains, and I know the names they use in asking for the drinks they want, which are “dope” and “koke.” When they ask for “dope” and “coke” they want “Coca-Cola” and mean “Coca-Cola.”

(Objected to by defendants because irrelevant and not warranted by the pleadings. Overruled. Exception.)

In my travels, experience and observation, I have discovered that there are commonly used nicknames for “Coca-Cola.” The words “dope” and “coke,” as applied to a soda-fountain beverage, mean “Coca-Cola.” No, sir; I have never seen any advertising of any soda-fountain [364] beverage under the name of “Koke” or “Dope.”

Cross-examination by Mr. LITTLETON.

Yes, sir, I have heard people say “give me a shot,” or “give me a shot-in-the-arm,” a few times

(Deposition of Magnus L. Ramey.)

in calling for "Coca-Cola." They ask for it that way just because it is a nickname. "Shot-in-the-arm" is a nickname for "Coca-Cola."

Deposition of Winton Holmes Troutman, for Plaintiff.

WINTON HOLMES TROUTMAN.

Direct Examination by Mr. ROGERS.

I am 24 years old, live in Newnan, Georgia, am a representative of the Coca-Cola Company, and have been for fifteen months. Yes, sir, I travel in their interest over Southern Georgia and Florida, and make about three hundred towns. I call on the soda-fountain trade, druggists, and am about soda-fountains continually. Yes, sir; I observed the names used by people in ordering drinks and am in a position to form an opinion as to what they mean when they use certain language. Yes, sir; I have observed what they get when they use the various names that they may use. Yes, sir; I am familiar with "Coca-Cola" and know how it is asked for. Yes, sir; in the course of my travels, experience and observation, I have discovered that there are commonly used nicknames for "Coca-Cola," which are "dope" and koke." The words "koke" and "dope," as applied to a soda-fountain beverage, or soft drink, mean "Coca-Cola."

(Objected to by defendants as irrelevant and not warranted by the pleadings. Overruled. Exception.)

(Deposition of Winton Holmes Troutman.)

No, sir; I haven't ever seen any advertising of any product under the name of "Dope" or "Koke."

Cross-examination by Mr. LITTLETON.

No, sir; I have not heard the expression "give me a shot," that is not in my territory, nor "give me some poison." I have heard "Coca-Cola" called "Candler's high-ball," that is the only thing I have heard besides "dope" and "koke." Yes, I have worked towns in Southern Georgia and have ridden on the Central of Georgia railroad and I [365] know the drink they sell on that railroad called "Chero-Cola." Yes, sir, I have observed people buying that drink on that railroad. No, sir, I have never heard them ask for it as "dope" or "koke," they ask for "Chero-Cola." It might be in one or two instances I have heard it asked for as "dope" or "koke," I didnt pay any special attention. Yes, sir, I swear that only in one or two instances during my extensive travels through Southern Georgia, over the Central of Georgia railroad, I have only heard "Chero-Cola" asked for as "dope" two or three times."

(Mr. HIRSCH.—We object to that because the witness did not say any such thing. Overruled. Exception.)

One reason is, when anybody calls for "dope" on the trains they say they haven't got "dope," got "Chero-Cola"—everybody knows "dope" and "coke" is a nickname for "Coca-Cola." No, sir, everybody when they want "Chero-Cola" ask for "Chero-Cola" and don't say "dope" or "koke," be-

(Deposition of Winton Holmes Troutman.)

cause when they ask for “dope” or “coke” they give them “Coca-Cola,” because that is what they want. Yes, sir, I know of my knowledge that “Coca-Cola” has been sold when people ask for “dope” and “coke.”

Deposition of Asa G. Candler, for Plaintiff.

ASA G. CANDLER.

Direct Examination by Mr. ROGERS.

My full name is Asa Griggs Candler. I was born in Villa Rica, Carroll County, State of Georgia, U. S. A., in 1851. I reside at 61 Elizabeth Street, Atlanta, Georgia, in this county. I have been living in Atlanta since 1873. Around 1885, 1886 and 1887, I was in the drug business on Peachtree Street under the name of Asa G. Candler & Company, probably I was under three different names while in the drug business. First it was Hallman & Candler, and then Howard & Candler, and then it was Asa G. Candler & Company. Yes, sir; I was a member of the firm of Walker, Candler & Company, but that was not in the drug business. That firm proposed to manufacture and sell “Coca-Cola.” Yes, sir, I have examined Plaintiff’s Exhibit #73 and I recognize [366] the signatures thereon and my name is mentioned therein. The same applies to Plaintiff’s Exhibits Nos. 74, 75, and 76. I can tell you exactly the name I was doing business under in a certain year, I can tell you exactly. I told you a while ago what business I was in in 1884, and 1885. That’s what I propose to answer—what name I was doing business

(Deposition of Asa G. Candler.)

under in a certain year. In 1884 and 1885 it was A. G. Candler & Company. In 1886, Howard & Candler, I believe, then in 1887 it was A. G. Candler. In 1888 it was Asa G. Candler & Company. In 1889, A. G. Candler & Company. I went out of business—that is, quit buying and selling anything, in 1890—I didn't quit and go out because people owed me, you know. I actively engaged in the business of Walker, Candler & Company, as much as anybody did. I tried to collect for what was sold and saw that the business was attended to. I think I was generally in charge of the business of Walker, Candler & Company, as financial head of it, I don't think Mr. Walker did anything but travel. Oh, yes, I know Dr. J. S. Pemberton well, I was intimately acquainted with him until—why, I suppose Dr. Pemberton felt I was one of his best friends in this town. Yes, sir, I knew him up to his death. I remember the occurrence but not the date of his death.

In 1892 I formed the corporation, the Coca-Cola Company. I was president of the company and have been ever since then, and have been actively in charge of the business right straight along since then, and have kept a general oversight of everything pertaining to the business. The business of the Coca-Cola Company has been, since 1892, the manufacturing and selling of the syrup known as "Coca-Cola." Yes, sir, it has been extensively advertised. I don't think I have ever been to any place in this country that I did not see "Coca-Cola" advertised. One of the first places I ever was in

(Deposition of Asa G. Candler.)

here was Pemberton's drug store, in the Kimball House, that was Pemberton, Pulliam & Company. No, sir, I never was at any place where he was manufacturing goods. No, sir; I don't know what utensils [367] he personally used; I don't remember seeing him handle anything. When I owned "Coca-Cola" individually, F. M. Robinson was continuously with me from beginning to end, overseeing the manufacturing. I didn't attend to the manufacturing, only in a general way. He did that. As a member of the firm of Walker-Candler & Company the same thing happened so far as I can recollect. Yes, sir, I know concerning all these documents you have asked me about. All of them represent the genuine signatures of the parties thereto and the documents are the genuine documents that were passed. The five notes presented to me marked Plaintiff's Exhibit #77, bear my signature. They were given to Mrs. Dozier—my information was she was a sister of Woolfolk Walker—and that was given to Woolfolk Walker (indicating) and that was (indicating), and it was his interest represented in the "Coca-Cola" business.

(Plaintiff's Exhibit #77 was here tendered and offered in evidence by plaintiff.)

Yes, sir; these notes were paid.

Cross-examination by Mr. LITTLETON.

Yes, sir; I had a connection with this product "Coca-Cola" prior to April, 1888. I have forgotten exactly what connection—I don't know whether it is in there—it was as early as 1887. The connection

(Deposition of Asa G. Candler.)

I had was that it was being billed by me and collected by me as late as 1887, then I was doing business as A. G. Candler. No, I do not mean that I was buying it from the Pemberton Chemical Company. I never knew anything I had to do with the Pemberton Chemical Company at all, so far as I know of, in connection with "Coca-Cola," in 1887. Wasn't Robinson manufacturing that up there on Marietta Street—under my direction—isn't there any documents to that effect?—that's my opinion. No, I can't remember without referring to these documents. Let me see what it is—this is way back in 1891—seems to be 1891—what do these indicate here?—my impression is now that I had the whole control of it, as far as the business was concerned, in 1887. [368] I was directing its policy in 1887—in 1888 more and more so. I don't know whether I had bought it or not at that time; I don't know what I had done. These gentlemen got to owing me a great deal of money in 1887, and the whole product had to be manufactured and sold through my business, that's my impression now. No, I didn't own the "Coca-Cola" business, but I controlled it because they owed me enough money for me to control it. I controlled it by seeing that the sales were made and the money was collected by me—I thought you had a date on that, I thought Robinson got up a little pamphlet with the certificates dated 1887. Before 1888 the control I had over it was to see that I got all the money that was sold any goods for. In other words, I think it was the fall of 1887, in those

(Deposition of Asa G. Candler.)

times soda-fountains didn't keep open much after September. My recollection is that I then intervened into the affairs of this Pemberton Chemical Company and took all the "Coca-Cola" they made and sold it out of my own company and collected all of the revenue—that's my recollection of the way it was handled exactly. I was doing that right on up until I took it over, which was evidently August 30, 1888—that's when I took that interest over, I think you will find the Pemberton interest before that. No, I didn't manufacture any personally before 1887. Robinson had manufactured it, collected it all, and did everything else before 1888. Robinson might have been called my agent in 1888. As well as I recollect, it was early, right from the beginning of 1888—as I remarked a minute ago, there was not much done in the soda-water business until the spring. I have a very distinct impression of selling a concern in Columbus on the 31st day of March, dating his bill in April. That was sold by me then under this trade name as far as I can recollect. That's what I remember, selling Howard & Evans, of Columbus, Georgia, a barrel of "Coca-Cola" on the 31st day of March, I think, 1888. Yes, I think that was "Coca-Cola" which I, or my company, had made, I am satisfied it was. No, I don't think I was making "Coca-Cola" before I bought any interest in it. I don't think I did, no, I never was. I don't remember whether I made any "Coca-Cola" before the 31st day of [369] March; no, sir, I am not certain that I made some on the 31st day of March; am certain I sold it on that date. No, I don't know

(Deposition of Asa G. Candler.)

when I began to make it—I don't know a thing about making it. No, I can't come within two or three months of the time in 1888, when I began to make it. I didn't have any company then. Oh, Walker, Candler & Company—well, that company, yes. Does that document show that? I am not going to try to testify about any of these affairs; I thought the document was the best evidence. We were in existence April 14, 1888. I was doing business then, that was it. I can't tell you whether or not I had what "Coca-Cola" was made prior thereto shipped to my drug-store to be sold by me. I can't tell you about the details of that, whether it was sent to my drug store and shipped from there, that I don't remember. What I said about taking all the "Coca-Cola" that was made and selling it myself and collecting the proceeds, didn't mean that I had to bring it to my drug store and ship it, did it? No, I do not remember how I exercised my control over "Coca-Cola." What details do you want? Tell me and I will answer your questions, if I can, as to how I exercised this control. I will do my level best to let you have it, if I can do it. I don't know how I exercised my control over "Coca-Cola," I have forgotten, if I could do it reasonably I would do it. I can't remember all the ways. No, I did not say I did not know anything about the Pemberton Chemical Company. I know they were in existence. There was a half gross of "Wine Coca"; have you got the bill there? I bought a half gross of "Wine Coca." I would not be able to say that that is all I ever bought of that. I expect I bought more of it,

(Deposition of Asa G. Candler.)

but I know that because I have seen a bill of that lately, it is probably down there in my desk now. No, sir, I don't remember whether I bought in large quantities or small quantities—that's "Wine Coca"—no, sir, because you would probably want to know when I bought it and I don't remember. "Wine of Coca" was labeled "Wine of Coca." I do not remember anything on the label, any legend on there besides the name. [370] No, I do not know what that was made of—said to have been made out of coca-leaves and various and divers things, put up in a bottle to be retailed for a dollar. I can't remember whether it was also made of cola nuts; I expect so, but I don't know. My store at that time was both a wholesale and a retail store. The color of this "Wine of Coca" at that time was red. Do I have to answer all that stuff—go into all that stuff? You ask, was "Wine of Coca" a tonic. I don't believe I have to answer all of these things, I don't care to go into it if I don't have to. They claim it was tonic, that's what they said. I have a clear recollection of how it looked *actly*, but I don't know anything about it. Oh, yes; it was a liquid put up in a bottle. My recollection is it was called "Wine Coca." Oh, yes, sir, yes, sir, to be taken internally. My recollection is Dr. Pemberton was doing business in 1887 on Marietta Street, I believe it was in 1887, if he had not moved, he was down on Pryor Street, somewhere down there, he went on Pryor Street, just what date it was I could hardly be expected to recollect that, you know. You ask if in my drug business from 1884 to 1887 I handled

(Deposition of Asa G. Candler.)

any other beverages; now, what do you mean by beverages? We sold liquor and I don't know really what we did sell, really—is that what you mean by beverages? We made no specialty, we sold lemon syrup and sold it by the gross, strawberry syrup and raspberry syrup. No, sir, we did not make any root beer; I don't know whether there was any root beer made in those times. You ask, did we sell sarsaparilla; now, what is sarsaparilla? Yes, sir; I think I do know what it is. I want you to tell me what you mean. I didn't know it was a soda-water beverage. We had a syrup called sarsaparilla and we put it in the soda-fountain and ran it through a tube. I don't remember that we made it, we may have—anybody made it, so far as I know—sarsaparilla syrup. No, sir, I don't remember how I made it at all. The color of that sarsaparilla syrup was brown, I think; you know more about sarsaparilla syrup in a minute than I do; I see you do. Yes, I think it was a dark reddish brown. [371] I don't know whether I ever made a drop of sarsaparilla syrup—I don't think I know anything about that. No, sir, I don't know what I used to color it with. No, sir, I did not handle ginger ale at that time; I don't remember that there was any ginger ale at that time, that is my recollection about it. Yes, sir, I think I did handle burnt sugar or caramel coloring. Now, I made a many a batch of caramel coloring—it's a standard coloring matter. In those days it was used in the drug business. I don't know whether everybody used it or not, but I did. No, sir, I did not put it in vanilla flavoring. Vanilla

(Deposition of Asa G. Candler.)

has enough coloring itself if you use genuine vanilla. Yes, sir; I said caramel is a standard coloring matter.

You ask if I remember the kind of receptacles in which "Coca-Cola" syrup was put up in 1886 and 1887; I thought you said I didn't have anything to do with it in 1886, didn't you? The first time I ever saw "Coca-Cola" it was in a tin can. That must have been in 1887, I believe. Then, later on, it was put up in kegs and barrels painted red,—the same color as "Coca-Cola" barrels and kegs are painted now, as near as we could get it. No, it was not when the Pemberton Chemical Company was making it. You didn't ask me that; you asked me what it was in 1887 and I told you what I put it up in afterwards. I don't remember whether that was in 1887 or not. When I put it up I put it in red kegs. I expect it was the same way if you want me to "expect" about it. I thought you didn't care for me to "expect." After I began to make this "Coca-Cola" I have no recollection from whom I bought my fluid extract of coca—I didn't buy it from anybody, I made it myself. I made it from coca-leaves, of course—I can say positively, you know. I can't remember who it was made it for me, it was someone—I made most of it myself. Yes, sir, I remember the process by which I made it.

"XQ. 97. Explain that process, if you will."

(Mr. HIRSCH.—"I object to that because it is incompetent, irrelevant and immaterial and, as counsel for the Coca-Cola Company, I advise the witness [372] not to answer that question.")

(Deposition of Asa G. Candler.)

“I am not asking the process of ‘Coca-Cola,’ but the fluid extract of coca.”

“A. I don’t think that is necessary.”

(Mr. HIRSCH.—“I object to that further on the ground that it is a trade secret and, as counsel for the Coca-Cola Company, advise the witness not to answer the question.”)

Our process of making the fluid extract of coca was a secret process, it was to us, the manner in which it was made. No, I don’t know the manner in which other concerns make fluid extract of coca. It is in the books, you can get the U. S. Dispensatory, it will tell you. No, sir, I didn’t make it that way. This fluid extract of coca that I refer to was derived from coca leaves,—erythroxyton coca. I don’t know that I bought the coca leaves; I don’t know whether I can answer that or not. I don’t know who I bought them from at that time. I bought them on the market, of course. I could not give you the names now.

“XQ. 104. Do you know what the vital principal, or the chief alkaloid, of coca leaves is?”

(Objected to by plaintiff as irrelevant and immaterial and not based on anything in the direct examination.)

“A. Oh, I am not going to answer that, if you want to know that you can get that in all the books of the country.”

(Mr. LITTLETON.—“Just put this down—we except to the entire deposition of this witness, unless he is going to answer the questions propounded, and we will reserve the right to further cross-examine him

(Deposition of Asa G. Candler.)

after the Court has ruled on the question whether or not he is required to answer these questions.”)

Yes, sir; I was the Candler in Walker, Candler & Company. You ask whether April 14, 1888, when J. S. and C. M. Pemberton made this transfer to Walker, Candler & Company, was the first time I ever owned any interest in “Coca-Cola”; I don’t remember exactly what the connection, whether I owned it or not; I believe it was, I can’t say positively, it looks like it, that’s the record. I don’t think J. S. [373] and C. M. Pemberton were running either the Pemberton Chemical Company or the Pemberton Medicine Company on April 14, 1888—what was Lowndes and that crowd doing at that time? My recollection is that after April 14, 1888, J. S. and C. M. Pemberton were interested in the Pemberton Medicine Company. C. M. Pemberton was Dr. Pemberton’s wife. Physically, I don’t think she had anything to do with it. Clifford Pemberton, I think, is her name. After this transfer, April 14, 1888, to Walker, Candler & Company, they, in connection with others, operated the Pemberton Medicine Company—that’s it, yes sir. That Company’s business was manufacturing “Wine Coca,” and they undertook to manufacture,—it was a hair dye, and they had “Globe Flower Cough Sprup” and “Compound Stillinga,” and shortly after I bought “Coca-Cola” they started out manufacturing a soda-fountain drink which was as near like “Coca-Cola,” in color, as they could get it—that is, a man named Mayfield that was connected with that company—he called it

(Deposition of Asa G. Candler.)

“Yum Yum.” I don’t recollect that I ever tasted it. I am not certain whether that was manufactured by the Pemberton Medicine Company or by J. C. Mayfield—he seemed to be the active man in it; Dr. Pemberton was a sick man at that time. I don’t know anything about who else was in it. I think Mr. Bloodworth was in it, since you mention it, and Mr. Murphy. Yes, that’s right, they were connected with the Pemberton Medicine Company. I never heard of any cola beverage which they manufactured except “Yum Yum.” They tried to make it as similar to “Coca-Cola” as they could. I never heard of their manufacturing a drink called cocoa. The first year of Walker, Candler & Company’s ownership of “Coca-Cola,” from 1888 on, the business was very light. No, it was not altogether local. It was in the State, I think probably some business was done in Nashville; Walker was traveling all over the country trying to sell it. And these people, Mayfield, Bloodworth and Murphy were running the Pemberton Medicine Company, for a while—I don’t think they ran it long—and they were manufacturing a drink similar to “Coca-Cola” at that time, but I don’t think they manufactured it long,—if they did they didn’t do much with it. [374] I know they quit entirely not long afterwards. Mr. Mayfield asked favors of me—he stored all his stuff in my place, kept it there for a long time. Oh, yes, there is a drink called “Afri-Cola.” I have heard of it frequently. Yes, sir, I think I have seen it—I know I have. It’s about as near the color of “Coca-Cola” as they could get it. It is sold in barrels whenever they can—sometimes

(Deposition of Asa G. Candler.)

go far enough to say it's the same thing—there ain't many folks they can fool long. Yes, sir, there is a "Ko-Nut,"—that's run by the same gang, I think—they did not succeed very well. Yes, sir; I think that is sold in red barrels, too,—the only way I know, I see red barrels traveling around town, red barrels and no labels, and they tell me it's "Afri-Cola." I don't believe I ever heard of "Ala-Cola." I understand that Hagan & Dodd make "Afri-Cola" and "Ko-Nut." I don't know, but I think they have been making it ten or twelve years. I don't know whether they are doing anything with the "Afri-Cola," I don't see it much—I don't know about the "Afri-Cola." I never saw it in my life; what I saw traveling around through this town didn't even have a label on the barrel. I pass it every day, and I never saw a barrel coming out of Hagan & Dodd's place with a label on in my life. Oh, yes, I knew Mayfield in 1888. When he went out of business, or, rather, quit it, he came up and as a kindness to him I took his stuff, which stayed in my place for a long time, I don't know how long—that was his remnants, his bottles and so on. I never knew what became of Mr. Bloodworth and Mr. Murphy. They lived at Barnsville, did they not? I never knew of them except as a corporation. (Mr. HIRSCH.—"Mr Candler, you can answer that question he asked you a while ago—go ahead and tell him what is the leading alkaloid contained in the coca leaf.")

ANSWER. "Cocaine, that is the leading alkaloid."

